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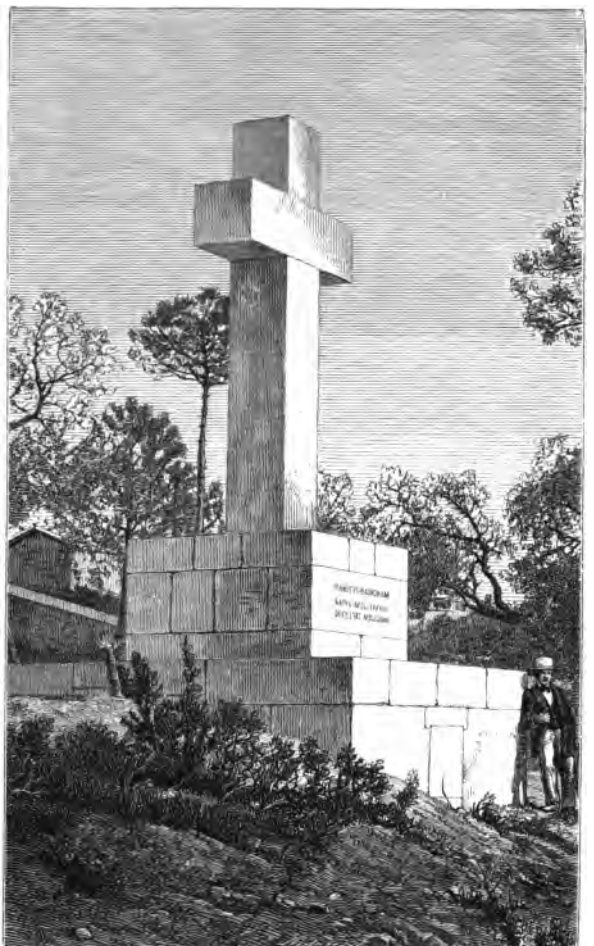

MONUMENT ON THE GRAVE OF LORD BROUGHAM AT CANNES.

INSCRIPTION:

HENRICUS. BROUGHAM.

NATUS . MDCCLXXVIII.

DECESSIT . MDCCCLXVIII.

WORKS

OF

HENRY LORD BROUGHAM

VOL. XI.

THE BRITISH CONSTITUTION:
ITS HISTORY, STRUCTURE,

EDINBURGH
ADAM AND CHARLES BLACK
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TO

THE QUEEN.

MADAM,

I presume to lay at your Majesty's feet a Work, the result of many years' diligent study, much calm reflection, and a long life's experience. It professes to record facts, institute comparisons, draw conclusions, and expound principles, often too little considered in this country by those who enjoy the inestimable blessings of our political system; and little understood in other countries by those who are endeavouring to naturalize it among themselves, and for whose success the wishes of all must be more hearty than their hopes can be sanguine.

The subject of the Book, *The British Constitution*, has a natural connection with your Majesty's auspicious reign, which is not more adorned by the domestic virtues of the Sovereign than by the strictly constitutional exercise of Her high office, redounding to the security of the Crown, the true glory of the Monarch, and the happiness of the People. Entirely joining with all my fellow-citizens in feelings of gratitude

towards such a Ruler, I have individually a deep sense of the kindness with which your Majesty has graciously extended the honours formerly bestowed, the reasons assigned for that favour, and the precedents followed in granting it.

With these sentiments of humble attachment and respect,

I am,

Your Majesty's most faithful Subject,
and most dutiful Servant,

BROUGHAM.

BROUGHAM,
11*th Dec.*, 1860.

NOTICE.

In concluding this series of Lord Brougham's works, the publishers have much pleasure in recording their satisfaction with the favourable reception it has met with. The present volume being the last of the series, contains two valuable additions, viz.—a Chronological List of Lord Brougham's publications, and a General Index. The former has been compiled by Mr Ralph Thomas, a well known contributor to "Notes and Queries," and the latter, by the Rev. Alexander Beverley, M.A., of Aberdeen.

In connection with the index, it may be interesting to notice here, Lord Brougham's own idea as to the plan upon which such a work should be constructed. This is gathered from a note of instructions forwarded to the publishers several years ago, in connection with his Speeches, as follows:—"A book and an index are to be made on opposite principles: a good book cannot be too concise—a good index can hardly be too prolix. Repetitions are to be avoided in the former, in the latter they should abound. For as one man's memory takes hold of one *tag* of a subject, and another man's of another, so

you must have all the *tags* possible in your index, that all may lay hold of it. Nay, the same man will remember a thing differently, according to the various views with which he consults the index at different times, &c." A *fac-simile* of the note containing these remarks is appended to this volume, and as a final illustration, there is inserted a view of the monument erected over Lord Brougham's last resting place at Cannes, reduced from a photograph, which was kindly supplied for this purpose by the present Baron. This monument consists of a plain cross of granite of the country, twenty-two feet high, exclusive of the base. It is placed upon the grave, the ground for which, with a large space around, having been gifted to the family of Brougham in perpetuity by the town of Cannes. The epitaph consists of the following simple record :—

HENRICUS · BROUGHAM
NATUS · MDCCLXXVIII
DECESSIT · MDCCCLXVIII.

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INTRODUCTION.

THE design of this work is to explain the structure of the British Constitution, and the principles upon which it is founded; to trace its history, and show in what manner its present excellence has been attained; to compare it with other popular systems in ancient and modern times; to show that even since its present form was assumed, it has been improved, and is still capable in certain respects of further improvement, adapting itself to new circumstances, although, if left untouched, it secures to the people, in an ample measure, the blessings which it is the object of all government to bestow. Its present state and past history are therefore the subject of the work. Upon both of these heads the result of the inquiries into which we are about to enter may be shortly stated.

The combination of different interests and powers at once provides against the encroachment of any one, and against error in the action of the whole; uniting in itself the distinctive qualities of all the pure unmixed forms of government,—Regal, Patrician, Republican; and endowed with their respective virtues; borrowing vigour from Monarchy, stability from Aristocracy, popular freedom from Democracy. The people possess by their representatives a voice in the management of their own affairs; a real control over the conduct of their rulers; and a sensible weight in the selection of the public servants.—The owners of property, the possessors of rank, and the represen-

tatives of all kinds of personal eminence, have a power and authority sufficient to check the excesses of popular violence.—The Sovereign can influence the conduct of public affairs as far as is compatible with the deliberate and continuing will of the other branches of the government. Above all, the unspeakable blessing of a pure and impartial administration of justice is secured by the absolute independence of the Judges, and their exclusion from all share in parliamentary, or even in any political proceedings.

The structure of the Constitution has been likened to a pyramid, of which the broad base, supporting the whole, is formed by the People; the middle portion is the Aristocracy of rank, property, talents, and acquirements; and on the narrow summit rests the Crown. The Judicial power, pure and unsullied, calmly exercised by men independent of all the other orders, removed from all faction, and partaking neither its fury nor its delusions, forms a mighty zone which girds the fabric round about, connecting the loftier and narrower with the humbler and broader layers, binding the whole compactly together, repressing the encroachments, and smoothing the ruggedness of every part. But grievously do they err who question the necessity of the Aristocracy as an integral portion of the system. Nothing else can protect liberty from an arbitrary sovereign, or from the more insupportable tyranny of the irresponsible multitude.*

The conducting in public of the whole business of the State by discussion in the two Houses, may be reckoned a part of the Constitution, because it is the necessary consequence of Representative Government; and the right of public meetings, and of a free press, is hardly less a necessary result. The greatest secu-

* To the want of a patrician body may perhaps be traced, more than to any other circumstance, the establishment of absolute monarchy in France. —The influence of the multitude in other countries is illustrated in a subsequent part of this work, (see especially pp. 421, 422).

rity is thus provided against abuse and oppression—against the maltreatment of individuals as well as injury to bodies; and no little security against error and oversight in every part of the national concerns. Merits which so naturally flow from the Constitution may well be regarded as structural, and not functional; and they are of inestimable value.

But the history of the Constitution, of the steps by which it acquired its present form, affords an important subject of contemplation, and of satisfaction. The progress was gradual, even slow; attended with no shocks, no alternations of enslavement and emancipation, of subjection and license. It never was despotic, but grew from a less regular system of freedom to a scheme of government more and more regularly defined, till it attained the form of a monarchy limited by law, in which all oppression, whether of one or of many, was precluded by the union of several branches, and of different interests. And if it be certain that by such a system alone can tyranny of every kind be prevented, its gradual growth, if not its greatest virtue is assuredly the cause of its excellence. Laws are made; Constitutions grow, at least if they are of any value; they have roots, they bear, they ripen, they endure. Those that are fashioned resemble painted sticks planted in the ground, as I have seen in other countries what are called *trees of Liberty*. They strike no root, bear no fruit, swiftly decay, and ere long perish. Nature, indeed, as Bolingbroke says, beautifully translating a fine passage of Lord Bacon, "throws out altogether, and at once, the whole system of every tree, and the rudiments of all its parts; but she leaves the growth to time." It is cherished by the breeze, strengthened by the sun, expanded by the shower.*—Such is the course of nature; but man must work by another and a tentative process. Having to deal with human beings, and

* "Mulcent auræ, firmat sol, educat imber."—(*Catul.*)

possessing no gift of foresight, he must consult the past, and take experience for his guide, adding what has been found wanting, changing what has been found hurtful, removing what has been found cumbrous. By this safe and gradual operation our system has been framed in the course of ages; its progress occasionally slow, sometimes for a season even suspended; rarely sustaining any violent check; and so little broken by forcible concussions that all its permanent improvements have been effected peaceably, and only short lived changes been the work of force.

The distinguishing characteristic of our Constitution is not confined to the manner and process of its formation. The felicity has indeed been inestimable of our having obtained its blessings without paying the price in public calamities and crimes. But the acquisition we have made is greatly increased in value by the manner of making it. The structure is much better than if it had been formed in any other way. Even in providing a habitation, as well as in framing a Constitution, comfort and convenience may be better secured by altering a house already built and inhabited, than by raising one on an entirely new plan. The prudent thus find the risk little, the benefit great; while others erect fine mansions which they don't care to use, and give rise to the proverb that fools build houses for wise men to live in. So we feel the utmost confidence in all the principal parts of our system, because they are the result of actual experience, and of mutual concessions where a conflict of opposing interests, or adverse parties has arisen.

The history of our Constitution, in Church and in State, is the history of compromise; and it redounds mightily to the national honour, for it records the wisdom and the virtue of the community in all its portions. The rival powers of the government—the various interests of classes—the differences of parties, —all by their contentions, have secured the rights of

THE

BRITISH CONSTITUTION.

CHAPTER I.

MIXED GOVERNMENT—ITS ORIGIN AND NECESSITY.

The British Constitution is not a pure, but a mixed one, being a Mixed Monarchy; and the necessity of such a combination arises from the pure forms of government being insufficient to secure the rights of the people and the good administration of their affairs.

There are three great divisions under which governments, where they are of the simple and unmixed form, may be classed, according to the hands in which the supreme power is lodged. It may be vested in a single person—or it may be vested in a particular class different from the bulk of the community—or it may be vested in the community at large. In the first case the government is called a *Monarchy*, from the Greek words signifying the rule of a single person; *Despotism* (also from the Greek word for a master) means the absolute and uncontrolled power of one master; but in ordinary language the word denotes rather the abuse of Monarchy than a separate form of it. In the second case it is called an *Aristocracy*, from the Greek words signifying the power or prevalence of the best, or highest classes—literally the best in respect of virtue—but practically the upper-

most in point of authority. Where but a few of this class—a select number or subordinate body—has obtained the exclusive control, it is termed an *Oligarchy*, that is to say, the government of a few; but this is rather the abuse of the Aristocratic form than a separate kind of government, as Despotism is the abuse of the Monarchical form. In the third case it is called a *Democracy*, from the Greek words signifying the power or prevalence of the people; and sometimes a *Republic*, from the Latin words meaning the Commonwealth or people's interest, although the term Republic includes also Aristocracies.

In order that any one of these forms of government should be pure and perfect in its kind, the supreme power should not only be lodged in one of those three manners—vested in one of those three bodies or authorities—but vested in it exclusively and without any control or check from any other of those bodies. A pure or absolute Monarchy implies that the sovereign should have the whole power, legislative and executive, in his own person, without any share whatever being possessed by any other person, or by any body in the State. If his power is shared, or if his functions are exercised subject to any control or check, the government is no longer purely Monarchical, but in some degree mixed, and partakes in part of the other two forms, according as the supreme power may be shared with, or the control vested in, a part or the whole of the other members of the community—verging towards Aristocracy in the one case and towards Democracy in the other. In like manner, if the Aristocracy shares its authority with the people at large. or allows any check over its operations to the people at large, or to any individual functionary over whose creation it has no control, the government is no longer a pure but a mixed Aristocracy—and so of a Democracy.

Monarchy may be either of the constitutional—the European description, or of the despotic—the Oriental kind. In the former, although no division of the

sovereign's power exists, yet there is a check upon it from the existence of classes possessing a certain influence in the community—the barons, or great landowners, whose privileges arose out of the feudal system, and the inhabitants of towns, which from their wealth rose to importance. In the latter, the sovereign is not checked by any influence whatever, and his absolute power is in every way most hurtful to the character and the interests of the community. It is hurtful to their character, because the prevailing dread of the prince, or his deputies, engenders falsehood, cruelty, and selfishness. It is hurtful to their interests, because the caprice of an individual or his creatures, alone directs the whole policy of the State; and as he lives under the constant fear of any change, he sets himself to prevent all improvement. The tendency of all Monarchy is towards despotism and its evils; and a constitutional Monarchy which provides no checks, that is, a pure Monarchy, has enormous defects, even if it should not degenerate into an Oriental despotism. It leaves too great scope to the sovereign's interests or passions, benefits the people very little by the alliance he always forms with the nobles, gives facilities to humour his ambition by wars, allows reckless extravagance of every kind, encourages habits of costly ostentation and of pride towards inferiors, and begets a spirit of fawning and truckling towards those in authority.

The evils of the purely Aristocratic form are great and remediless. The supreme power is vested in a body wholly irresponsible—a body above the fear of personal violence, by which even the individual despot may be controlled—equally uninfluenced by public opinion, which in some degree he feels; a body whose interests are always separate from, often opposed to, those of the community at large. It is, like the Monarchy, subject to the risks of wickedness and imbecility, the accidents of birth or disease, without the compensating benefit of hereditary succession in averting the danger of civil commotion. Finally, it promotes dissoluteness

of manners, and encourages insolence and selfishness, as well as luxurious indulgence. The redeeming qualities of this form of government are its firmness of purpose, resistance of violent change, discountenance of warlike policy, and encouragement of genius.

The Democratic form has some virtues of a high order. The rulers have no sinister interests; personal ambition has no scope; purity is promoted, not merely in the conduct of public men, but in the manners of the people; and the resources of the State are husbanded at all times; while in war they are fully called forth. The defects, however, are equal to the excellences. The supreme power is placed in wholly irresponsible hands, because the holders of it are secure from all personal risk, and beyond the reach of censure; and those whom they choose to exercise it share in their irresponsibility. The tyranny of the multitude is intolerable, because it pervades the whole community searchingly, and oppresses the humblest as well as the highest. Faction is even more predominant than in Aristocracies on certain subjects, and always the most important. Anything like free discussion is impossible. The administration of justice is constantly interfered with, especially of criminal justice. There is no security for steady and consistent policy, either in foreign or domestic affairs; a risk of entire and violent change attends the administration, and even the constitution; and the peace of the country, as well abroad as at home, is in perpetual and imminent danger.

Such being the evils inherent in all the pure forms of government, it is necessary to provide by a combination of powers, and by the check of one upon another, for their remedy; and there cannot be a greater error than to suppose, as some ingenious and learned men have done, that no balance of those powers can exist.

The main foundation of the objection to the doctrine which rests upon the counteracting influence of different powers in the same constitution, will be perceived to

arise from a misconception of that doctrine. When properly conceived and stated, it does not represent the conflicting authorities as accurately balancing one another; it only regards the influence of one power as capable of limiting the exercise of another; and it assumes that none of the powers is in itself absolute, or would, even if left to itself, be carried to all extremities. Thus, it never was supposed that a despotic prince being established in any State, and at the same time an Aristocracy of equally unlimited powers, there could be any other result of the conflict than a direct collision and the complete dominion of whichever body prevailed. Place the Sultan of Turkey and the Aristocracy of Venice together in one system, no one can doubt that either the Vizier or the Council of Ten would gain the upper hand, and either a pure Despotism or a pure Aristocracy would speedily be established. But the question is, what would be the result of a combination between the powers of a sovereign accustomed to regard himself as one authority, perhaps to consider himself as the supreme, but still not as the exclusive depository of arbitrary power, and a patrician body accustomed to consider themselves as the magnates in a country acknowledging a monarch? In such a system both parties will be disposed to resist each other, to encroach upon each other, even to risk an open rupture with each other upon certain occasions,—by no means on every occasion, and only up to a certain point even on those special occasions, and by no means to take extreme courses and push matters to an irreparable rupture even on those few and excepted occasions. This brings us immediately to that which is at once the foundation of the doctrine of checks or balances, and the exposition of the fallacy upon which the objectors rest.

The efficacy of the check always consists in the general reluctance of all parties to risk the consequences of driving matters to extremities. To avoid this each will yield a little; and, sometimes, where the

concession is not fatal, one will give up the point to the other, expecting in its turn to have some point of the like kind yielded at another time. Thus the result will be, that neither body will carry everything its own way; but a course will be taken different from what would have been taken had there been only either the one body or the other in the system. As far as the interests of the different bodies are concerned, those of both will be better consulted than if only one had existed; and in proportion as the interests of the whole community are identified with those of both the bodies, will the community be a gainer by the result of the conflict. But we are not now considering the checks as to their beneficial tendency,—we are on the question whether such checks can exist at all; and it is plain that the compromise which the conflict produces shows the real existence of the checks and their efficacy.

Let us then, to take the simplest instance, suppose there are two bodies in a State, the consent of both of which is required before any given measure can be adopted—for example, any law made—and that in this respect the two bodies are exactly of equal authority. A law is propounded and agreed to by one of them, to which the other will not consent, or will only consent if it shall be materially altered. The first body refuses to alter it, and the second, therefore, will not concur in adopting it. For the present the change in the law cannot be effected, and must be deferred. The refusal of the second body may become less unqualified another year; or the alterations now demanded may be such that the first body will agree to them, provided some one or two things more be given up. In the end the measure passes; not such as either body would have desired had it been alone in the legislature, but such as both can agree to.

But suppose now, that one of the two is far more powerful than the other in fact, though by law both are equal. It is said that the more powerful body will compel the other to yield, and that so the check ceases

to be effectual. But how can this compulsion be exercised? Only in one of two ways—either by the weaker body being afraid of resisting the stronger, for fear of its strength being used destructively, or by the stronger actually putting forth that strength; in other words, either by fear of the government being overthrown, or by its actual subversion. This, however, is an extremity to which the stronger body will very rarely resort; in the great majority of instances it will prefer yielding many points, to avoid the mischiefs of such a course; and the weaker body, being aware of this, will generally make a stout resistance. The stronger may carry more points in this way than the weaker, because the real power of the two bodies being unequal, the Constitution inclines towards the one side. Thus, if the more powerful body be popular, the government leans towards Democracy; if patrician, it inclines to Aristocracy; but the leaning of the legislature being, as it must always be, in the direction of the more powerful body, so far from showing that the combined action of the two bodies produces no effect, only shows that the movement which results is according to the proportion of the two forces whose combined operation causes it, and that the government is carried on according to the nature and principles of its structure.

The fallacy is this,—It is always taken for granted that every one is at all times sure to do whatever he is able to do. Now, if this were at all true, the whole frame of civil society must be destroyed, and all government subverted; or, rather, no society ever could be established, and no government formed. What forms the principal strength of any government, and every constituted authority in any given government? Doubtless the mutual distrust of the subjects is one very great security—the uncertainty in which each man is that others will support him if he resists. But this may be got over, and a common understanding may be come to for a common object. How seldom

does actual resistance take place! How many times is it avoided, when every inducement to it is presented, and every justification afforded, even in the view of the strictest reason and the purest patriotism! How many oppressions will be borne; how long a time will misrule, daily and hourly felt, be submitted to; how much grievous suffering will be endured in quiet by millions, whose slightest movement could subvert the hateful tyranny, and restore general prosperity and ease! The main cause of this patience is the universal disposition to avoid running risks, and the rooted dislike of pushing things to an extremity. But there is a further and most material circumstance which gives force to the constitutional check: it is legal; it is known and felt to be according to strict law and right; the wrong doer is felt to be he who would encroach and usurp; however superior he may be in might, the right is on the opposite side: and this has a direct tendency at once to invigorate the party resisting, however inferior in natural strength, and to dishearten and weaken the party encroaching, however superior in actual power.

Consider how in any State joint powers are exercised by subordinate authorities, and this will illustrate also the argument as to the supreme authorities. There are two bodies, or a body and a single functionary, which have a mutual veto on each other's proceedings; say, to take the simplest case, upon the choice of an office-bearer, the concurrence of both being required to make the election valid. According to the reasoning of those against whom we have been contending, the single functionary can always secure the appointment of his candidate, by refusing every person proposed by the body until the man of his choice is returned. But this, we know, does not happen in practice, and cannot happen; because neither party is disposed to bring matters to a collision by standing on its extreme rights, and both are disposed to have the choice effectually made. Therefore the knowledge

that certain persons are sure to be rejected prevents the body from selecting these; and the necessity of appointing some one induces the functionary to accept a person different from the one he would most have preferred. Neither party obtains the result most desired; but a person is chosen against whom neither has any very insuperable objection; and the probability is that a better choice is made than if either singly had selected.

Similar illustrations of the argument are afforded by those institutions in which more than a majority of voices is required to pronounce a valid decision, as where two-thirds or three-fourths must concur. The temptation given to minorities to hold out and govern the majority, is in most cases a sufficient argument against such arrangements: they are only admissible where a necessity for decision does not exist, as where the object is to prevent some measure from being adopted, or person elected, without a general concurrence, and where the entire interruption of the proceeding is not accounted an evil. But practically the result is by no means such as the theoretical reasoners would expect; the minority, having the power in its hands, is very often found to yield, and let a compromise take place.

It is true that in these cases of subordinate bodies the law and the supreme government controls both, enables each to exercise its rights, and prevents the one from encroaching or usurping upon the other. But in the case of co-ordinate bodies exercising the supreme power, the substitute for the control of the law and the government is the reluctance which each feels to bring on a collision. The compromise is effected, the middle course taken, by the superior authorities under the influence of this disposition, as in the cases of subordinate authorities under the control of the law and the influence of a similar reluctance jointly—the dislike, namely, to drive matters to the

extremity of calling in the arm of the law, or of suspending the operation which the common interest demands should proceed.

In examining the checks and regulations provided for tempering the force of popular power in Democratic Governments we find that there is a serious defect in the operation of those which owe their origin to the people themselves, because, being under their control, the efficacy of the countervailing principle is unavoidably precarious. In like manner, we find that when the method of securing full discussion of public measures consists in having two or more bodies which are required to concur before they can be adopted, if these several bodies are of the same kind, owing their origin to the same class of the people, composed of the same description of citizens, and holding their appointments for the same period of time, the security for mature deliberation is much more feeble than if those bodies were differently constructed and appointed. Now, in every pure Democracy this defect must needs impede the operation of all checks upon the popular will. So in every pure Aristocracy the checks must be formed out of the patrician body, and there can be no power to balance that body effectually, although contrivances may give the benefit of delay, and so prevent rash counsels from doing irreparable mischief. So, lastly, in every pure Monarchy, all the balances being under the sovereign's control, no very effectual check can be provided upon rash or upon oppressive proceedings of the monarch.

It thus appears that all pure forms of government are liable to this serious objection. As long as men are clothed with human infirmities, they in whose hands power is placed will be prone to abuse it; and if the power has some unavoidable restraints and limits, their effort will be to shake off the restraints and pass the limits as much as they can. The People in a pure Democracy will be disposed to carry all before them,

yielding to the voice of the greater number, who may often be the most unsafe guides. The Patrician body in a pure Aristocracy will be disposed to domineer over the people, and by degrees to confine their government to a few of their own body. The Sovereign in a pure Monarchy will be disposed to trample upon the natural rights of the community, and to disregard the interests of the many, for his own or his family's advantage. All the contrivances which are resorted to in each of these governments, in order to mitigate the violence of the ruling power, though very useful, indeed necessary, in order to make the system continue existing and working, are nevertheless very far from sufficient to produce the desired effect of tempering and regulating the action of the system. All of them are makeshifts rather than perfect. All of them have the radical defect of deriving their origin from the supreme governing power which they are designed to curb, or at least to mitigate in its operation, and of depending for their continuance upon the will and pleasure of that power.

This necessary defect in all the balances, and checks, and regulations which can be devised for a pure form of polity, is the true origin of Mixed Government. Let us take one instance to illustrate this position practically. The device of requiring two legislative bodies to concur in making any law is efficacious in proportion to the diversity between those bodies. If both proceed from the people whose power and will the double consent is intended to temper or control, this never can be effected completely, however different the constitution of the two may be. But if one body derives its existence from the people, being a portion or a representative of the people, and the other is neither appointed by the people nor accountable to the people, but formed of a class wholly removed beyond the popular control, a very effectual check will be afforded; and besides, what is of infinite moment, every

measure will be thoroughly discussed before it can be adopted.

A Mixed Government is that constitution into which more than one of the principles that form pure government enters, and in which the supreme power is lodged in more than one functionary or body, each being entirely independent of the other, and each being both irremovable by, and not accountable to, any authority whatever.

Thus if there be a sovereign and a patrician body, the government being vested in the hands of both, that is, certain functions requiring their joint consent, or some functions of supreme power being performed by one, and some by the other, the Monarchy is Mixed. So it would be even if the sovereign could admit members into the patrician body, provided they were for life, or if the patrician body elected the sovereign, provided he was irremovable. The Polish Government, sometimes called a Republic, sometimes an Elective Monarchy, was of this description; it was, properly speaking, a Mixed Aristocracy. The ancient republic of Sparta was a Mixed Aristocracy, though not of the same kind; for the sovereign, or rather the two sovereigns, at Sparta, were hereditary. The Hungarian Government is a Mixed Aristocracy, in which the Sovereign is not elective but hereditary. Carthage appears, like Rome after the first ages of the Commonwealth, to have had a Mixed Aristocracy of a very different kind, or, more properly speaking, a Mixed Democracy; for there was a patrician body from whom the Senate was chosen, probably by the people, as Aristotle condemns the system for leaning too much to the popular side. The qualification, however, of wealth as well as birth being required both for the *Suffetes*, or chief magistrates, and the Senate, and the general or popular assembly only being appealed to when those differed among themselves, as the whole legislation, and the most important executive functions also, were entrusted

to the Senate's hands in the first instance, their power made the constitution a Mixed Aristocracy.

In modern times, however, the most frequent combination has been that of Monarchy, Aristocracy, and Democracy—a kind of union which the ancients appear to have considered impossible, sometimes treating it as the mere romantic speculation of political dreamers. Thus Tacitus, after saying that all nations are either governed by the people, the patricians, or a sovereign, adds, that a kind of constitution formed by combination of these, is more easily praised than realized, and if realized, he says, it never can be of long duration.* Cicero gives the clearest opinion in its favour, without pronouncing it to be a chimerical scheme: "I hold," he says, "that government to be the best which is composed of the regal, patrician, and popular powers moderately blended together."† It may, however, be admitted that in ancient times, when there was no means of the people exercising their power, or share of the supreme power, without a direct interference in each act of government—that is to say, before the principle of Representation was discovered—the difficulty of maintaining a Mixed Government, in which the people should form a portion, must have been all but insurmountable.

1. The foundation of this, as of every other form of Mixed Government, is the absolute independence of each order in the State. If the sovereign, like the Roman consuls and Carthaginian suffetes, held his high office for a limited period only, and was then displaced at the pleasure either of the patricians or the people; if the select or privileged order held its patrician rank at either the sovereign's or the people's pleasure; if

* "Cunctas nationes et urbes, populus aut primores aut singuli regunt. Delecta ex his et constituta reipublicæ forma laudari facilius quam evenire; vel si evenit haud diuturna esse potest."—*Ann.*, lib. iv.

† "Statuo esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo (qu. optimatum?) et populari, modice confusa."—*De Rep.*

either the sovereign or the patricians could interfere with the popular assembly, influence directly the choice of its members, in the case of a representative system, or influence the deliberations of the popular body, representative or other, which exercised the people's part of the administration,—in neither case would the Government be Mixed of the three primary kinds, but in the first case it would be either a Mixed Aristocracy, or a Mixed Democracy; in the second case it would be a Mixed Democratic Monarchy, or a Mixed Monarchical Democracy; in the third case it would be either a Mixed Monarchical Aristocracy, or a Mixed Aristocratic Monarchy.

It would not be affirming too much, or refining too much, to regard the British Constitution, before 1832, as rather partaking more of an Aristocratic Monarchy than the triple combination for which its admirers claimed credit. Neither is it very easy to regard the late Constitution of France as having a sufficient aristocratic mixture to deserve that character. The want of influence and wealth in the nobility, and their legislative functions not being hereditary, hardly gave sufficient scope to the aristocratic principle.

2. Not only is it essential to a Mixed Government, that the different estates should be independent of one another, and each be independent of the powers to which the others are accountable; it is another essential requisite that each should be equally required to concur in every legislative act. If any one, or any two, where there are three estates, could make laws to bind the whole; if the majority of the estate could bind the minority, instead of all being required to concur in every act of legislation, the government would only be Mixed in name. Thus, if in England the King and Lords could legislate to bind the people, the Commons would only have a nominal power. So if the Lords and Commons could bind the Crown, the Sovereign would be only nominal; and though with

us he hardly ever exercises his negative, yet he effectually does the same thing by having the choice of his ministers, the selection of his servants among all those individuals of the people in whom the two Houses will confide; beside having great direct influence over the members of both Houses by his patronage and by his power of creating Peers.

3. The necessity of the several estates being each supreme and independent, and each required to concur in all important proceedings, is confined to acts of the supreme or legislative authority. If the Crown, for example, could interfere in any minor acts of the people or the nobles, as by nominating to certain places connected with popular meetings, the returning officer, for instance, in elections, or even the presiding officer in the patrician assembly, it would not cease to be, most strictly speaking, a Mixed Monarchy. So, too, the different estates may exercise important functions independent of each other; and so far from the Government ceasing to be Mixed, it would be the better as a Mixed Government for the distribution. No one regards the executive functions of the sovereign as any deviation from the Mixed polity, although neither the nobles nor the people can directly interfere with them. Our Monarchy is all the better as a Mixed Monarchy, because neither Peers nor Commons can ever interfere with the command of the army, or the appointment of ambassadors or of judges; and because the Peers can only exercise judicial authority, and the Commons can only impeach and not try public delinquents.

4. But in all these instances of separate powers being lodged in the several estates or orders, it is the nature of the Mixed polity, and flows directly from the combined operation of the parts, that one should in extreme cases act upon the other, even so as to impose a restraint upon each other in the exercise of their separate and independent functions. Thus, although

the Sovereign alone can appoint the judges, the ministers, the commanders of the forces, either House may censure a bad appointment; both together may cause the removal of a bad judge; and, one accusing, the other may try and convict a bad minister or commander. In all these cases the strict constitutional law requires that the three estates should concur; because, unless the Crown chooses to make the removal of a judge, it does not follow from the joint address of the Houses against him, the statute only empowering, and not requiring, that removal upon such an address. So, though a pardon cannot be (by statute) pleaded in bar of an impeachment by the Commons, the Crown must agree not to pardon before the sentence—the joint sentence—of the two Houses can be carried into effect. As for the censure on a minister, or address of one or both Houses to remove him, strictly speaking, the Crown is not bound by it. But in all such cases the great power possessed by the Houses, especially by the Commons, renders the Crown's yielding to their desire a matter of course. Indeed, if only the Commons take their line, and the Lords join with the Sovereign against them, an appeal to the people by a dissolution is the resource of the Constitution; and if this ends in the return of a parliament similarly resolved, the Crown and the Peers, almost always, must submit. However, in all the ordinary cases, this mutual interference of the estates with each other's separate and independent functions is not the course of the Constitution. It is a power always existing, but rarely acting; it is there, but is only called into exercise when an occasion arises that requires it,—an occasion that renders a check or balance necessary to regulate the movements of the whole machine, and prevent the excessive force of any one power from deranging or destroying it. They are like the more ingenious and refined contrivances of mechanical skill, which being only designed to prevent

mischief and restore equilibrium, are quiescent until the occasion arises when their action is required, and having discharged their appointed duty, become again inactive when the remedial operation has been performed.

The origin of the simple forms of government is lost in obscurity, because those constitutions have been first established in the earliest ages. The Mixed Governments have seldom been the earliest under which men lived, and we can therefore more frequently trace their origin. They have sometimes arisen from acts of violence committed by one power in the State encroaching upon all others in a manner not to be borne, and thus rousing a resistance which either entirely changed the political system, or introduced into it some checks calculated to prevent a repetition of the wrongs that had been suffered. But the more frequent origin of Mixed Government has been the gradual rise of one branch of the community into an importance that did not originally belong to it, and its consequently obtaining a share of the supreme power. As the anxiety to obtain this on the one part, before the influence which engendered it was completely established, would make the order rising into importance satisfied with a portion of the supreme power, and as those in possession would generally be disposed to yield a portion of the governing power, rather than risk the loss of the whole, a combined government would thus naturally arise in the State, and continue for a greater or less time to maintain itself, according as the shares of power given to the parties were well or ill adjusted, and the joint action was well or ill adapted to the circumstances of the community. Sometimes attempts would be made by one party to regain the exclusive influence which it had lost; sometimes the other party would seek to extend its power and govern exclusively in its turn. If the machine were ill adjusted, new changes might take place, with more or less violence,

to produce a better adaptation of its different parts to each other's action, and of the whole movement to the situation of the country; and in examples of all these changes, by sudden revolution or by gradual accommodation, or by both acting at different times in the same system, the history of Mixed Governments in both ancient and modern times abounds.

The Spartan Constitution could hardly be called mixed. To the anarchy of the disjointed government under the two kings prior to Lycurgus, succeeded a constitution by him, modelled on that of Crete, and which was nearly a pure Aristocracy. It was not till above a century after his decease that the Ephoral power became any protection to the people; and in a very short time the Ephori became altogether identified with the Aristocratic body, so as to eradicate whatever mixture of Democracy had for some years been introduced.

The Roman government under the kings appears to have been a Mixed Monarchy, or Aristocracy in which the patrician body was gradually overpowered by the king. When, with the aid of the people, it had effected a revolution, expelling the kings, the Aristocracy gained an uncontrolled ascendancy and became pure. The popular power, increasing with the numbers and the wealth of the people, gradually undermined the Aristocracy, and established for some time a Democratic Commonwealth. But the patricians soon regained a portion of their influence, and the government was a Mixed Aristocracy until the tyranny of the patricians, the corruption of the plebeians, and the conflicts of factions, after a scene of unparalleled violence and cruelty, prepared the way for a pure and absolute despotism.

It would be a great abuse of terms to call the Venetian a Mixed Aristocracy, because of the Doge being appointed for life; for he had no real share in the legislative power or in the important administrative functions. That singular government continued for six

centuries in the form into which it was finally moulded. But at a much earlier period there was a Mixed Government established at Venice, in consequence of the ruinous contests carried on by the different islets of which the State was composed,—contests which threatened the entire conquest of the whole by the Sclavonians and the Lombards, the latter attacking by land, the former by sea. Under the pressure of this exigency an executive officer, the Doge or Duke, was introduced into the system, and with great administrative power and extensive patronage: but as the general or popular assembly retained the legislative power in its hands, beside electing the Doge, the government might now be regarded as Mixed. The increased power of the Doge, from foreign conquest, occasioned frequent struggles between that magistrate and the people at whose head the nobles placed themselves. But, generally speaking, the Doge prevailed, because no permanent measure was adopted to restrain his power, although the struggles of the parties frequently led to his violent death. After the lapse of nearly two centuries and a-half (1030) a check was at length contrived, and the government became more really mixed than it ever had been, in consequence of a body being created, whose concurrence with the chief magistrate was required to legalize his acts. For about a century and a-half the government continued to be really of a Mixed form, when the Aristocracy was established, which continued for six centuries, without any change, to rule the Republic.

In Genoa the Aristocracy was not so long established, nor so uninterrupted in its continuance. But nothing like a Mixed Government was ever established. There were frequent alternations of aristocratic or oligarchical tyranny and mob government, each faction wreaking its vengeance on its adversaries when it obtained the advantage. But for the most part the people were subjected, and the patricians ruled the State.

Of the other Italian Commonwealths the history has been generally alike; first a pure Aristocracy; then a mixture of Democratic influence as the people's wealth increased; then, for a while, a subjugation of the patricians to the burghers; followed by an entirely Aristocratic constitution, which ended in purely Monarchical Government.

The United Provinces have undergone several revolutions, but the most important change was that which gradually took place in the beginning of the seventeenth century, and converted a Democratic Government slightly mingled with Monarchical institutions into a Burgher Aristocracy. The House of Nassau has more than once been reduced for several years to a state of nullity in the government; but the favour of that illustrious family with the people has always been sufficient in the long-run to retain its power, and keep the government mixed. William III. was enabled, by his great success in establishing our free government and obtaining the crown of this kingdom, to place the Mixed Constitution of his own country upon a more stable foundation; and since that period it has, with little interruption, formed a Monarchy, really of a Mixed kind, and since the overthrow of the French power, a Mixed or Limited Monarchy in name as well as in substance.

The government of France was never really of a Mixed kind till the results of the Revolution in 1789 established a Limited Monarchy, which the Republic displaced, but which was afterwards restored on Napoleon's downfall. The powers of the States-General and Parliaments were too ill defined to constitute a Mixed Monarchy before the reign of Louis XIII.—In Arragon the Cortes was of sufficient weight to constitute a Mixed Monarchy, from the expulsion of the Moors to the reign of Charles V.—Perhaps we may give the same name to the government of Sicily. But a really Mixed or Limited Monarchy in both Spain

and Portugal has arisen out of the changes brought about by the French Revolution and the wars which it occasioned.

In the Scandinavian governments, the tyranny of the sovereign was succeeded by a more intolerable tyranny of the nobles, which made the constitution both of Sweden and Denmark only Mixed Monarchy in name, the sovereign's share of the supreme power being exceedingly inconsiderable, and the people's still more trifling, until by revolutionary movements, Denmark in 1661, and Sweden in 1772, but more effectually in 1789, became subject to absolute Monarchy.

The history of our own admirable Constitution will furnish many important illustrations of the steps by which a government becomes Mixed, or rather by which, from being composed of two, it becomes composed of the three powers. The Feudal Monarchy at first was more aristocratic than it afterwards became upon the conquest, from the powerful operation of the Imperfect Federal Union. In the course of two centuries a beginning was made of introducing the popular power into the system; but it was not till the end of the fourteenth century that this change had been completely effected, and that the Mixed Monarchy can be said to have been fully established, as we now find and now enjoy it.

The advantages of Mixed Government flow naturally from the imperfections that are always to be found even in the most finished form of pure government. We have thus been led incidentally to note many circumstances belonging to this branch of our subject; because, as often as we have considered the inconvenience of the pure form, and shown how it was necessary to temper its principles, we have found that there was a radical defect in all the contrivances which could be resorted to for that purpose, and that nothing but a departure from the strict and rigorous system could provide checks and balances which would prove effec-

tual. Now that departure was in truth the introduction of some other principle, or the mixture of some other form with the form under consideration.

The reason why these checks were not wholly to be relied on is plain. If the government must be kept in its perfect purity, all the checks must more or less partake of its fundamental principle; consequently, all of them must be liable to the same objection, and require modification or aid to reinforce them. But that could not be given without the introduction of something belonging to another form of government—some principle alien to the genius and spirit of the constitution in question. Thus—to take the example already resorted to—if it is desired to check the rash and erroneous acts of a purely popular legislation, the utmost that we can do by means of devices not inconsistent with the purely democratic principle, is to frame rules of proceeding which occasion delay and give time for deliberation. But the same power which formed these rules may abrogate or suspend them; and the occasions on which they are most likely to be dispensed with, are precisely those when excited passions render their controlling operation the most necessary to prevent mischief. If the House of Commons, or Chamber of Deputies, were only restrained by their Standing Orders, how often would these be suspended when they stood between those Assemblies and the object of their eager desire! So, if another Chamber, or another House, were added to those several bodies, and its assent also were required to the measure, the same eager desire to pass it would operate in that second body, if its constitution were as popular as the structure of the former. Nothing but another origin, or other duration, or other materials, can secure the checks required upon the first body's proceedings, and this is making the government Mixed. If the only difference were, as in America, a higher qualification in the members, or a

longer duration of their commission, unless they held their places for life, no effectual check would be obtained from them; and even that would be of very inferior efficacy to the restraint imposed by a totally different order of men, as a hereditary privileged class, or an executive magistrate holding his office by inheritance or chosen for life.

We thus perceive that the only effectual checks and balances in any system of polity are those which depend upon the introduction of different kinds of power. The separate and independent existence of different estates or authorities, each required to concur in all acts, each free to act as it pleases, and as its separate interests prompt, each armed with some independent power of resistance to the others, is the only effectual method of preventing one body in the government, or one class of the community, from ruling uncontrolled, subjecting all the rest, and mismanaging the public affairs.

CHAPTER II.

VIRTUES AND VICES OF MIXED GOVERNMENT.

ALL the advantages which can be shown to arise from checks and balances in the system of government, are peculiarly the produce of that combination of different powers and principles in which a Mixed Government consists; and it becomes unnecessary to discuss these minutely. But it may be well to state that the three great advantages which a Mixed Government possesses over every other, are its protecting the public interest from the risk of rash, ill-concerted councils, its securing the freedom and the rights of all classes in the community, and its maintaining the stability of the political system.

1. The prevention of rash counsels is most surely obtained from the conflict, or rather the mutual counter-action, of different independent powers in one system. If one party is to detail, however ably, however fairly, before a judge the whole merits of any case, unopposed, we know full well how many views of the subject, how many arguments, and how many facts, will escape his best attention. But if two, less able, incomparably less candid, appear before the judge, nay each as unfair and as violent in his statements as possible, their contention will leave no point unsifted, and the whole matter will soon be ripe for safe decision. In the former instance, the judge will hesitate and pause, fear to go wrong, falter in doing right; and after his utmost care he will never be quite sure that he has avoided error. In the latter instance he will have no anxiety at all, unless the facts are necessarily obscure, and the principles ill ascertained by the law;

and he will generally give a speedy, a complete, and a correct decision. In like manner no better safeguard can be devised against an unreflecting course of proceeding, than the consecutive discussion of each measure by bodies which have different, often conflicting, interests, and which will unavoidably take very different views of the same question. Haste, rashness, is with certainty thus excluded; error, misdecision, becomes exceedingly unlikely.

2. The effect of Mixed Government in protecting the rights and liberties of all classes is equally striking, and if possible more important. In truth there can be no other safe and secure protection for the whole community. If the Sovereign is absolute, there is no resource but resistance; and long before public wrongs have ripened into the general desire of redress which makes resistance safe or even justifiable, extreme oppression may have been exercised and great hardships endured. An Aristocracy is not so fatal to liberty or so fruitful of wrong in one respect, that the mutual jealousy of the patricians, and the parties which are the natural produce of this soil, afford some protection to the people at large. But the government of a select body may be oppressive in other respects; it may even be worse to bear than the absolute dominion of one. In a Democracy, there is no security for the party whose rights are grudged and whose influence is dreaded by the ruling power; the tyranny and intolerance of the majority has been already fully described, and it has been found perhaps the worst of all. All the checks provided in any one of these three systems, and constituted out of its own materials alone, are unavailing to make every one's rights secure, and to provide for each class a safeguard against the too great power of the preponderating party. But when there are opposing or conflicting interests, no one body in the State can set the law at defiance with so great facility as when all power is centred in one description of the community.

A natural jealousy arises of each other when the supreme power is lodged, not in one, but in several estates or orders; and hence not only does it become difficult for one of these to encroach upon the rights of the others, but neither is likely to permit such an encroachment upon a third party,—such as a third estate where there are three, or a portion of either where there are two. If an Aristocracy were disposed to maltreat a portion of the patrician body in a government composed of two branches, the representatives of the people being one, the latter would assuredly take the part of the oppressed class of patricians. So the sovereign, in a State where there was only a popular body besides, would not suffer a measure to pass which should be levelled at the just rights of any part of the people. But the most perfect Mixed Government is that which consists of a body representing each class,—the people by their own deputies, the men of rank and wealth by the aristocratic chamber, and the executive departments of the State, military and civil, by the sovereign. Let any subject be aggrieved by the popular deputies, the Aristocratic body or the Crown will seek to have him righted. Let any executive officer be aggrieved by the patrician body, the popular assembly will join the Crown in obtaining redress for him. Let any just privilege of rank and station be invaded by the Crown, the people's deputies will join the Aristocratic body in defending it; and if the nobles were to be oppressed by the people, they would find a resource in the sovereign against this oppression.

3. The stability of the mixed system of polity is evidently in much less hazard from internal commotion than that of any pure government whatever. Everything which tends to secure men's rights and prevent injustice is a guarantee of internal peace, because it removes the most powerful cause of violent change—unredressed grievances. Moreover, when each class of the community is represented effectually in the

legislature of a country, a safety-valve, as it were, is provided, by which any dangerous spirit of discontent may escape. A popular representation alone is indeed an excellent contrivance for this purpose; but there may be no representation of the minority; or some classes, as men of rank and wealth, may be imperfectly represented, and at any rate the majority of a single body is supreme. When a second body is provided, independent of the popular deputies, the chances of serious discontents are diminished, in proportion as all whom the latter discontent and vex find their protectors in the former, without the necessity of recourse to any violent measures. Besides, when all the stability of any government depends upon the security of a single power in the State, the system rests upon a much narrower basis than when several bodies share the supreme power. The popular deputies form no doubt the most secure, because the broadest, foundation for the government; but suppose a powerful faction, discontented with the proceedings, and impatient of the oppressions of that popular body, should intrigue with a foreign power, or with a successful commander favoured by this dissatisfied minority, how much less securely would such a system be enabled to meet the peril, than if there were an aristocratic body to resist these consequences of the popular domination, if it had failed to prevent that oppression itself! That the existence of three branches affords a still safer refuge from the violence which would overthrow a single one, is equally obvious. In fact, the great hazard of all revolutionary movements is the operation of some sudden and violent impulse. The action of three co-ordinate bodies, beside removing the temptation from all classes to act against the established government, resists the change when it is attempted, and gives time for the machine to right itself from the shock.

The vices of the system, which has so many and such precious virtues, lie within a narrow compass indeed.

It may be charged with a tendency to multiply parties, by giving to every class of men a protection, and thus showing that each faction may make itself powerful in the administration of affairs. But experience has shown the tendency of parties to multiply in both aristocratic and popular governments of a pure form. We may be told that the establishment of more orders than one tends to impair the vigour of the administration. But when against this is set the evil of rashness, to which the most pure and vigorous government must needs be exposed, because of there being no check upon its movements, a sufficient reason is given for preferring that safety, which in the long-run will even prove an increase of all wholesome vigour. We prefer the engine which in twenty-four years cannot run the hazard of exploding, to that which, working much more rapidly, may be blown up in twenty-four hours. —If it be said, and this is the common ground of complaint, that the people's interest requires an unobstructed progress, which the counterpoise of a sovereign or of a privileged class impedes, and that the good of the many is thus sacrificed to the benefit or to the prejudices of one or of a few—the answer is, that without denying the possible occurrence of cases in which this high price may be paid for the benefits of a Mixed Constitution, yet those constantly enjoyed benefits, of equal rights, good government, and security against wide-spreading revolution, are well purchased by the payment of that occasional price. It may be added, that the virtues or vices of any government are to be estimated, not by taking an account of its working for a few years, but on the long-run, and that the security of this Mixed System in the long-run will conduce more to the progress of the people's interests, than a removal of all the obstruction which the checks and balances can create.

CHAPTER III.

REPRESENTATION—ITS ORIGIN AND HISTORY.

BEFORE proceeding to describe the British Constitution, the most perfect example of Mixed Government, it is necessary to consider the origin and history of the great modern improvement, the Representative principle upon which our Constitutional system is founded.

As long as the Democratic principle is kept pure, unmixed, and uncontrolled—that is, as long as the supreme power is exercised by the whole body of the people—it cannot be applied practically to a large community. In order that the government may be carried on by the people, it may not be necessary that they should perform each act of the supreme or controlling administration—that is, issue the necessary orders to the tribunals, to the tax-gatherers, or to the commanders. This control or general superintendence may be devolved upon a council more or less numerous; it may even be entrusted to a single functionary, or two, as at Rome; and provided they hold their office only for a short period, the Democracy is still pure, just as it is pure though justice is administered, taxes collected, and troops commanded, by persons entrusted with these high functions. But the power of making laws and of choosing the administrative council, or functionaries, resides in the people, and can only be exercised by themselves. It is not necessary that they should appoint the judge, the tax-gatherer, or the captain; but they must choose the council or the functionary by whom these appointments are to be made. Then, whether they are to assemble for each act of legislation, and also for each administrative act,

or only for the more important legislative measures, and the general administrative superintendence, their assembling, and frequently assembling, is essential to their retention of the supreme power in their own hands; and they cannot assemble in very large numbers, unless their meeting is a mere pretence, because the coming together for the purpose of exercising the highest political offices, the making of laws, and the conduct or control of the public affairs, implies great deliberation and the full discussion of the subjects propounded.

All writers who have treated on this subject have agreed, as might be expected, that these considerations affix a necessary, indeed a physical, limit to the extent of a country governed by a pure Democracy.

In all the attempts to extend the range of Democratic Government in ancient times, by federal unions, and enable it to embrace a larger territory, it must be carefully kept in view that there was nothing whatever of Representation. There was choice, there was election; the people selected a functionary, and appointed him as their delegate—that is, as the delegate of the whole community—to act for it in the convention of delegates from other similar communities. He was to declare their particular will, and not to consult for the good of the whole. Each member of the federal union was heard by its delegate, as if it had been heard by itself. He was like an ambassador sent to treat with the ambassadors sent by other States. He was not a representative sent by one portion of a community, to consult with the representatives of other portions of the same community, and to devise the measures best adapted for securing the interests of the whole. On the contrary, he was an agent commissioned to watch over the separate, independent, and possibly conflicting interests of his principal. In some sort the interest of the whole union was to be regarded, because it was the interest of the part which sent him to preserve the

existence of the whole. Mutual protection, the origin of the association, implied mutual aid, and, to a certain degree, mutual sacrifices for the safety of the whole. But in no other sense had the delegate a truly representative character. This is the first and leading distinction between the ancient and the modern principle.

The other distinction is hardly less important. The general council, or Diet, had no concern whatever with the internal administration of the States which were represented in it. The only subjects of its deliberation were those matters which concerned the mutual intercourse of the different States, and their common interests with respect to foreigners, to other States, or other confederacies. Each State was sovereign and independent within itself, and administered exclusively its own affairs. Nothing can more than this show how entirely the delegates must be considered as mere agents or ambassadors, how different their functions were from those of representatives, how completely the government of the whole federacy differed from a Representative Government. The utmost that can be said is, that the union was representative *quoad hoc;* representative as far as the international relations of the different members, and the common relations of the whole with foreign powers, were concerned. In the same sense, ministers sent to a congress of the European powers may be said to represent the different States, in settling international questions and questions regarding other powers not admitted to the congress.

The Representative principle, the grand invention of modern times, is entirely different in both these essential particulars. It consists in each portion of the same community choosing a person to whom the share of that portion in the general government of the whole shall be entrusted; and not only the administration of the affairs of the whole as related to other communities, or the administration of the affairs of each portion in its relation to other portions of the State, but the

administration of all the concerns whatever of that separate portion.

Thus, the delegate from Thebes, or the Bœotarch, as he was called, being probably a lord, the chief magistrate in his quality of the deputy to the Diet, only represented the interest of Thebes in that Diet, and he only consulted there respecting the relations between Thebes and the other Bœotian cities, or respecting the relations of the whole Bœotian union with foreign States, as Athens and Sparta. He had no power to treat of any matter concerning the internal government, the domestic affairs of Thebes, any more than of Athens or Sparta. But the delegates from London to the British Parliament, or from Paris to the French Chamber of Deputies, are authorized to consult, not only respecting the relations of Paris with Marseilles, and of London with Liverpool, or of all England with America, or all France with Spain, but they have exactly the same authority to consult and enact respecting the police, the magistracy, the civil rights, the criminal laws, of London and of Paris.

The difference here stated between the Federal Delegate and the Representative does not depend upon the way in which we may regard a representative's duty with respect to the instructions of his constituents, or with respect to the interests which he is bound to consult. Whether he is to obey the instructions of those who choose him, or to follow the course indicated by his own judgment—whether he is to regard himself as representing those who elect him, or the whole State—he is still vested with an authority, and exercises functions different, and different in kind, from those of the delegate to a federal congress. The matters respecting which he is to consult, and on which he is to decide, are specifically different from those which fall within the delegate's competence. They include the latter; but their most important branch is foreign to the commission of the delegate. That com-

mission, too, is in its nature somewhat occasional. When a treaty is in agitation, when hostilities are in contemplation or in progress, when any dispute has arisen between members of the federacy, then the functions of the congress come into active exercise. But the duties of the representative, comprising the administration of internal affairs, the affairs of every portion of the community, of each State in the league, are constant and not occasional. If, indeed, the congress of a federal union had the power of legislating for each of its members added to its proper office of deciding among them, and of representing them all with foreign States—then, indeed, there would be a close resemblance between the Congress and a Representative body; but the union would cease to resemble that of the federacies either in ancient or modern times.

We may observe another difference not immaterial between the two systems. The modern representative is chosen and appointed merely as such; his only capacity is representative. The ancient delegate was probably in all cases a magistrate, generally the chief of the State who sent him. He was elected to rule that State at home, and he acted for it in the congress, as the sovereigns who attend our modern diplomatic congresses act for their own States, or send their ambassadors to represent them and act for them. He represented the local sovereignty in the general council. The representative represents no sovereignty or power residing among or ruling over his constituents; he represents them as speaking for their interests, in one view of his duties—as consulting for the interests of the whole community, in another view of these duties.

The essence of Representation, then, is that the power of the people should be parted with, and given over, for a limited period, to the deputy chosen by the people, and that he should perform that part in the government which, but for this transfer, would have

been performed by the people themselves. All these several things must concur to constitute Representation.

1. The power must be parted with, and given over. —It is not a Representation if the constituents so far retain a control as to act for themselves. They may communicate with their delegate; they may inform him of their wishes, their opinions, their circumstances; they may pronounce their judgment upon his public conduct; they may even call upon him to follow their instructions, and warn him that if he disobeys they will no longer trust him, or re-elect him, to represent them. But he is to act—not they; he is to act for them—not they for themselves. If they interfere directly, and take the power out of his hands, not only is the main object of Representation defeated, but a conflict and a confusion is introduced that makes the representation rather prejudicial than advantageous.

2. The people's power must be given over for a limited time.—This is essential to the system. If the delegation be for ever, allowing the deputy to name, or to join with others in naming his successor, or even if he be continued for his life, and the constituent name his successor, the virtue of the system is gone, and the body of representatives becomes an oligarchy, elective indeed, but still an oligarchy, and not a Representative body.

3. The power must be given over for a limited period to deputies chosen by the people.—This is of all others the most essential requisite. If any authority but the people appoint the deputies, there is an end of Representation; the people's power is usurped and taken from them; and instead of having any concern in making the laws that are to govern them, or in administering the affairs of the State, some other power legislates and rules over them, and in spite of them, although it may add insult to injury by the mockery of pretending to govern in their name.

4. Finally, the representatives are to perform that part in the government which would otherwise have been performed by the people.—They are to administer the local as well as the general concerns; they are to govern each part as well as the whole. But they may have a greater or a less share in the government without its ceasing to be of a representative nature. That would be in the strict sense a representative constitution in which the people's deputies were circumscribed in their authority; in which, for example, a prince or a patrician body had the sole right of propounding measures, or in which all control of the public purse was left to the patrician body, or in which all patronage was vested in the sovereign. The extent of the powers vested in the deputies of the people is immaterial to the question whether these be a representative body or not, provided that the deputies come in the people's place. If the Democracy was pure, the substitution of representatives makes those representatives absolute while their authority is unrevoked. If the government was mixed, by the addition either of a sovereign, or of an aristocracy, or both, the substitution of representatives gives them a portion of the government, which continues mixed still.

It may perhaps be supposed that this Representation is of two several kinds; as the representative, it may be said, either has the discretion of deciding and acting according to his own judgment, or he is bound to decide and to act according to the commands of his constituents; and some may suggest that the one of these is a proper or perfect, the other an improper or imperfect kind of Representation. But I conceive that this is altogether an incorrect view of the subject, and rests upon a misapprehension of the representative principle. If the deputies are mere delegates sent to do as their constituents direct, their appointment can hardly be said to vary the constitution from what it was before; the power is still in the people's hands, though executed

by an agent. Besides, nothing can be more inconsistent, or indeed more absurd, than for men to meet in order to vote as they have been ordered; nor can anything be more preposterous than for those men to be selected with care in order to perform this mechanical task. It is not of the least importance who are chosen for the purpose. Nay, it is not of the least importance by whom they are chosen. Men appointed by any other power in the State would be just as capable of giving the prescribed votes, as the representatives the most carefully selected by the people themselves. The importance is transferred from the proceedings of the deputies to the proceedings of the constituent bodies. The whole government of the State depends upon what passes in the local assemblies, not upon what is transacted in the council of the deputies. When those local assemblies have resolved severally on any matter, the decision of their representatives is a mere ceremony, and a useless ceremony. There is no occasion for them to meet at all. A clerk receiving the instructions and publishing the result, would be quite as good as the operation of taking the votes. Nay, a mere publication of the results of all the local meetings held to instruct the deputies, would enable any person to ascertain what the determination had been.

Nor is there any medium between this state of things, which makes the whole mechanical, and the representative character a mockery, and the state of things which I have described as constituting the definition of Representative Government. Some have with little reflection maintained that a general discretion may be given to the deputy, but that on occasions of extraordinary importance he must obey the instructions of his constituents. Who is to determine what is and what is not an important occasion? Do we not know that the important measure always means the present measure, and that the people ever give that name to the matter in hand, ever confine their attention exclusively

to the affair of the day? Besides, suppose we had any test of relative importance, the very occasions of highest moment are precisely those upon which it is the most inexpedient that the direct interference of the people should be allowed. The virtues of the representative system, as we shall presently see, most chiefly consist in the discretion being transferred upon such occasions.

The whole history of the representative principle proves the soundness of the doctrine for which I am contending; it shows that the vesting an entire discretion in the deputy is an essential part of the definition. Both in England and on the Continent the original form of the States was a council of the sovereign, composed of his feudal vassals, and convoked to aid him in his government with their local knowledge, or to render their assistance in his wars more hearty, or to receive his edicts and laws, published by his promulgating them at their assembly. The deputies of towns in those kingdoms, especially England and France, were, after some ages, summoned in order to facilitate the raising of taxes from the trading classes. Yet the writs of summons which we have, both to the town deputies, when they were called, and to the country deputies, when the lesser vassals sent representatives instead of attending in person, always indicated that much more was to be done than the mere delivering of the votes as by the envoys or agents of the electors. The famous writ of Simon de Montford (1264) in Henry the Third's reign, summoned from each county two knights "de legalioribus et discretioribus" of the county, and from each city and burgh two citizens or burgesses "de legalioribus et discretioribus et probioribus," of the citizens and burgesses; and those assembled were to treat and labour and consult with the king on the most important concerns of the realm, some of which are set forth in the preamble.* So the writ of 23 Ed. I. (1295)

* Parl. Writs, i. 16.

requires to be chosen two burgesses "de discretioribus et ad laborandum potentioribus." * In some writs the term used is "idonei;" in some it is "de sapientioribus et aptioribus civibus," as the writ 11 Ed. I. to cities and burghs.† The writ summoning the Sicilian parliament, in the same age (1240), required Syndics (Mayors) to be sent "de melioribus et magis sufficientibus." We shall presently see that the older Frankish summons required the Counts to be attended by the "meliores homines comitatus."

In other countries the origin of Representation is lost in obscurity, and the law establishing it being no longer known, we are obliged to collect its provisions from the tenor of the writs issued under them. But in Scotland the statute remains which first called to parliament the representatives of counties in James the First's reign, 1427. The freeholders are to choose "two or more wise men, with power to hear, treat, and formally determine, and to choose a speaker." (Act 1427, c. 102.) All these qualifications required of the deputies, and the functions they were called to perform, are wholly inconsistent with the supposition that representatives were originally commissioned merely to deliver a message, or act according to the will of their constituents, or give the vote of those constituents in the assembly. Discretion, ability to transact business, probity, respectability, station, and fitness, were manifestly quite immaterial in a person deputed merely to put in the votes of those who sent him; and the terms consulting, hearing, treating, determining, convey anything rather than an idea of this simple and mechanical function. We may therefore most confidently conclude that the exercise of discretion is essential to the representative character, and that the assembly of deputies is in its nature strictly a deliberative body.

Hence I apprehend it to be clear that the definition

* Rym. Fœd. Parl. Writs, i., 29.

† Parl. Writs, i.; and see Brady, 155.

above given of Representation may be relied on as strictly correct. It is the people parting with and giving over their power—for a limited period—to deputies chosen by themselves—those deputies fully and freely exercising that power instead of the people.

It is certain that although the commonwealths of ancient times had not in any part of their political system the representative principle, yet they made so near an approach to it as leaves us in some wonder how they never should have made this important step in the art of government. The delegation of persons to a federal council, and the assembly of the Amphictyons, might easily have suggested the idea of choosing men to represent the whole people in administering the internal affairs of any given State. Indeed, the election of magistrates, though apparently less like representation, is in reality more akin to it; for the powers of executive government are given over by the people to the functionaries chosen. This was necessary, because of the impossibility of a whole people exercising these functions. If, then, any of the old republics had been so extensive as to make assemblies of the people impossible, it is likely that the expedient would have been adopted of delegating the legislative functions to a smaller body. At Athens there were smaller bodies, chosen by lot, to exercise certain branches of government, not only judicial branches, but political, the senate being a select body thus chosen. Had the selection been by choice, and not by lot, this senate would have been a representative body. The extreme jealousy of the people, and their alarm lest any oligarchy should be introduced, prevented the elective principle being applied to the appointment of any powerful body. The blind hazard of the lot was deemed the only security against cabal, and intrigue, and individual ambition.

When the feudal system was introduced into Europe, and the provinces of the Roman Empire became Mon-

archies of a peculiar structure, unknown in ancient times, the barbarians who had overrun the provinces found no political institutions beyond those of an absolute despotism; but they brought with them a practice of restricting the chief's authority, as well as aiding him in his plans, both of peace and of war, by the council of his principal followers. Out of this practice arose the custom of assembling the great men, whether lay or clerical, on important occasions, and afterwards at stated periods, generally on the Continent twice a-year, at spring and fall.

The Saxon nations were more attached to liberty, and gave their princes less power than the Franks, who founded the French Monarchy, and the Normans, who afterwards obtained possession of a portion of France. The extent of the Saxon conquests gave their military chiefs greater authority when their dominions were enlarged than they had ever enjoyed when their possessions were more limited. In this island their institutions partook of the more ancient and free system; while in the south the royal authority was more arbitrary and uncontrolled, except in the Spanish Peninsula, where it was most restricted. But in all the feudal kingdoms, both before and after the complete establishment of the system, there were meetings of great men who assisted the sovereign, and who, in some sort, also set bounds to his power.

In England, under the Heptarchy, these assemblies are by some supposed to have been held as of the people's right, to whom the sharing of the supreme power between the king and the principal men was thought to afford a protection for their liberties. In the continental kingdoms, with the exception of Spain, the assemblies were rather convoked by the sovereign for his own benefit; and he thus both received local information from those who attended, living in various parts of the kingdom, and obtained also their concurrence in any warlike operations for which he might be

preparing. But the constitution of these assemblies, both before the feudal system was completely established, and for some time after, was nearly the same in this island, and in all parts of the Continent. There was nothing resembling an elective representation of any class in the country.

It seems well ascertained that those assemblies, called by the Saxons *Mickle-gemotes*, or *Witenagemotes* (Great Assemblies, or Assemblies of Wise, that is, Considerable, Men), were attended only by the allodial proprietors—that is, by the persons who owned land without any condition of service for it, either to king or to subject. It is probable that not even all proprietors of this class attended, but only the more considerable ones; and we are left uncertain if they had a right to attend, or if they only came on the summons of the prince. When the Saxon Heptarchy was united under one Monarchy by Egbert in the ninth century, we can have no doubt that a general gemote was held for the whole kingdom, in place of the Saxon gemote formerly held. Those who attended the gemotes were called *Witan*, literally wise or respectable men. The vassals were not deemed sufficiently independent to attend; and the peasants were in a state of villeinage. The only distinction between man and man was the possession of land, and the holding it free, or by rendering service to another. The landowners and nobles (*Magnates* or *Proceres*) were, therefore, the same body.

When the Conqueror obtained possession of England, he continued the Saxon practice of summoning councils, now called, from the Norman, Parliaments, to which, moreover, he was accustomed in Normandy; and during the earliest of the Norman reigns they were composed in the same manner. But soon after the Conquest a practice was introduced which appears to have afterwards been attended with important consequences. The king commissioned knights in each county to inquire respecting the local customs, the abuses of the

law, and the other grievances of the subject. It is probable that the *Missi Dominici* of Charlemagne gave the idea of these commissioners. These knights were sometimes named by the king, and sometimes chosen in the county court—that is, by all the freeholders assembled under the viscount or sheriff. Occasionally the same device was resorted to in order to collect subsidies. Justices in Eyre (*in itinere*), were commissioned to obtain these, and sometimes knights were added for each county. From this practice we may easily conceive that another became likely, the summoning so many knights to the general council, called the Colloquium or Parliament since the Norman Conquest, and which, as we have seen, succeeded to the Witenagemote. Accordingly, on one occasion we find the king summoning (1213) four knights for each county to meet him at Oxford, and discuss or treat with him (*ad agendum nobiscum*) on the state of the kingdom. John had at this time quarrelled with his greater barons, and he probably thought he could obtain favour and support from the freeholders at large. In Magna Charta a provision was introduced requiring the king to summon to parliament each prelate and greater baron individually by his own letter missive, and to summon the lesser barons through the sheriff or viscount.

The numbers of the Saxon gemote were most probably diminished considerably before the Conquest; for, although it be true, as Mr. Millar contends (*English Government*, i., 219), that landed property became in the course of time much divided, it is equally certain that allodial property was daily diminished in amount by proprietors feudalizing it for the sake of obtaining protection under powerful lords, in that distracted state of society. In the Conqueror's parliament the prelates and the barons who held of the king *in capite* were in all probability the only members, and continued such for the next four reigns. Nor was the plan for that long period of

time introduced of the lesser barons sending some of their number to represent the whole. They did not, indeed, attend in person willingly; but they were frequently required by the king to appear; and their aid in counteracting the influence of the greater barons was a powerful motive for requiring them to perform this branch of the feudal duty, of the service due from them to the sovereign under whom their lands were holden.

It is, however, certain that each prelate and baron could, if absent himself from just cause, appear by his procuration or proxy. A Mercian charter, which is extant, has by its mention of proxies misled many political reasoners, and made them most erroneously contend that, as early as 811, there were representatives of the boroughs, because the charter purports to have been granted in the assembly of the prelates, barons, magnates, and *procurators*. It is judiciously remarked by Mr. Millar that the placing this in juxtaposition to magnates shows their proxies to be signified by the term. The mention made of an assent or applause by the multitude to whom the laws or resolutions made in the parliament or gemote were proclaimed, clearly proves nothing more than that they were present as spectators. Indeed, the silence of all the older historians and chroniclers, as well as of all the writs in those days, seems decisive of the question; and when we recollect that the local inferior courts of the shire, the hundred, and the tithing, were all composed of the landowners, as we know from the laws of Henry I.,* there can be no doubt that the general and superior court of parliament was constituted in the same manner.

The body of tenants *in capite* who owed this service of attending the king's council or parliament was not very numerous. By Doomsday-book it appears that

* LL. Hen. I., ch. vii., and *Laws of England*, vol. ii., published by the Record Commissioners.

in the time of the Conqueror they did not exceed 605, including about one hundred and forty ecclesiastics. Of the lay barons nine-tenths must have been the lesser, or common freeholders, who were summoned through the sheriff and without special writs, leaving not above forty or fifty of the great vassals. At what precise time or by what steps the attendance of the more numerous body, the lesser barons or common freeholders, was commuted for their choice of two of their number in each county, as representing the whole, we are unable to ascertain. That it must have been before the year 1264 seems clear; for the writ of Simon de Montford in that year directs the sheriff of each county to return two knights; and it can hardly be supposed that he would have loaded his usurpation with the additional odium of only summoning two of the freeholders in each county, had this been an innovation. The argument used by some, that we have no trace of any similar writs between that time and the 18th of Edward I., really proves nothing; for the general writs of summons are equally wanting; and that parliaments were repeatedly holden during that interval, and some of the most important statutes ever made were passed, we know for certain. The writs in 18 Edward I. are extant, and they command the return of knights for each shire, by election (*eligi facias*), to come with full power to consult and treat along with the greater barons. Representation of the freeholders or counties was, therefore, at least as early as 1290, fully established, but in all likelihood half a century before; and the step which led to it was probably the appointment of knights as royal commissioners, sometimes chosen in the county courts, in the way already stated.

The admission of the townsfolk to any share in the proceedings of parliament, was a yet more important step. The representative principle had been introduced; but it was only applied to relieve the free-

holders from the burden of an attendance which they had from time immemorial given as a necessary part, first of the gemote, then of the parliament. The citizens had never attended in any way. But whether De Montford thought it would serve his purpose to call them in, by letting them choose two of their number like the freeholders, or whether it had some years before been usual to admit them for the purpose of obtaining the more ready assent of the towns to the payment of subsidies, we are not precisely informed; and the question has produced very warm controversy. To me it appears that the balance of probability preponderates in favour of the position that De Montford first summoned the boroughs, and that for twenty-five years afterwards his precedent never was followed. The principal ground of this opinion is the evidence afforded by the statutes themselves.

Let us ask now how the parliament is described after Simon de Montford's writ in 1264. The answer certainly is, at first not otherwise than before the meeting so by him convened. The Statute of Merton (20th Henry III.) purports to be made by the king in the assembly of the prelates, earls, and barons, and the provisions made twenty-three years after (43d Henry III.) are said to be made by the king and his magnates. The Dictum de Kenilworth (51st & 52d Henry III.), soon after De Montford's parliament, purports to be made by those appointed by the king and his barons and counsellors; the Statute of Marlebridge next year by the king and the more discreet men, both greater and lesser—that is clearly the greater and lesser barons. The well-known Statute of Westminster 1st (3d Edward I.) purports to be made by the king, the prelates, earls, barons, and commonalty (communaute); but it is to be observed that the proclamation for its observance only states it to have been made by the prelates and magnates (Stat. of Record Com., i., 39). The Statute

De Bigamis (4th Edward I.) only mentions the king, the prelates, and his council. The Statute Rageman uses the same form, omitting the prelates. The Statute of Gloucester (6th Edward I.) mentions the discreet men, greater and lesser; the 7th Edward I., De Religiosis, is by the king and his council; and so is the Statute of Acton Burnel, 11th Edward I. The famous Statute de Donis, or Westminster 2d (13th Edward I.), is by the king, prelates, barons, and council; the Statutes of Winton and *Circumspecte agatis* only mention the king; and that of *Quia Emptores*, or Westminster 3d (18th Edward I.), mentions only the magnates of the king. The Statutes of *Quo Warranto* (18th and 20th Edward I.) merely state that they were made at a parliament. But whether the burgesses were present in these two years we are not informed. In the 25th Edward I., however, 1297, their right to be present is fully recognized; for they are named with the knights and magnates as constituent parts of parliament (Statute de Tallagio). As the Statute of Fines (27th Edward I.) mentions only the council; and that of false money, the same year, the prelates, earls, and barons; and that of 33d Edward I., the king and all his council; it is possible that a complete parliament was not at that time called, unless when a tax was to be imposed.

But the Statute of Carlisle (35th Edward I.) adopts another language; it purports to be made by the king, earls, barons, and regni sui communitates,—the commons or communities of his realm. This expression is the one afterwards most generally repeated. The word is sometimes *communes*, sometimes communauté, sometimes toute la communauté; and by comparing together the Statutes 7th, 12th, and 14th Edward II., 1st, 2d, 4th, 5th, 9th, 10th, and 25th Edward III., it is manifest, *first*, that there is no difference whatever in the thing signified by these two forms of speech; and, *secondly*, that both comprehended knights and

burgesses. This last proposition is manifest from 9th Edward III., which mentions knights, citizens, and burgesses as "coming for the commonalty."

The probability that these statutes so often omitted all mention of knights, citizens, and burgesses, because the matter related not to taxation, is greatly increased by the circumstance that we have the writs of summons to some of these parliaments, and the writs of expenses for their members; from which it appears that the knights, citizens, and burgesses were summoned, and that many attended. It also appears that, as early as 3d Edward I., customs were granted by "tous les graunds del realme et par la priere des communes de marchands." In 11th Edward I., all persons are summoned who can bear arms and have twenty librates of land; and also knights, citizens, and burgesses are summoned as to a parliament. This was holden at Salop on account of the expedition against Wales, and a subsidy of one thirtieth was granted, as well as a force raised. In 18th Edward I. the writ is to summon two or three knights to represent the community, which, by the writ of next year, is shown to be for the county only; yet they are called the community of all England. Next year, however, a French invasion being apprehended, citizens and burgesses, as well as knights, are summoned, there being great occasion for supplies. In 24th Edward I. we have the actual return of citizens and burgesses; and in 35th Edward I., though the statute made at the parliament of Carlisle only mentions the commons of the realm, we find the writ of expenses for citizens and burgesses in the collection of records (Parl. Writs, p. 192). The writ 23d Edward I. shows that community is a word of flexible import, for the knights are to represent the "community of the counties," the citizens and burgesses the "community of the towns." Likewise there is in 18th Edward I. a grant by the prelates and magnates for themselves and the community of the whole kingdom, of 40*s.* on each

knight's fee to marry the king's daughter (the feudal law only allowing two marks), consequently this was a grant made without the consent of the citizens and burgesses. It appears, then, that at first these attended only to be taxed.

Thus there seems every reason to consider that from the year 1264, when Simon de Montford summoned them, the towns were regularly summoned as often as a parliament was held, but that they only attended when there was a question of taxing them, and that it was only towards the end of Edward I.'s reign that they attended as a regular and essential part of every parliament.

That the cause of the important change which admitted them was the rise of the towns in wealth during the preceding century, there can be no doubt; as little can it be denied that the summoning their representatives was designed to make them more easily taxed. A singular illustration of this is preserved in some of the old writs still extant, and which shows that other means were used than the assembling their representatives together. In the 10th Edward I. we find the king sending one John de Kirkeby round to all the cities and boroughs, and desiring each of them to give entire credit to whatever he shall state in the matter which he is directed to handle with them severally. What that matter is we are not left to conjecture; for another writ returns the king's thanks for the subsidies which the towns promised him through John de Kirkeby.* It may be further observed, that this mission of Kirkeby seems strongly to countenance the supposition that the plan of summoning the burghs, adopted by De Montford, had either fallen for some years into disuse, or was not resorted to on all occasions. When the grant of one-thirtieth was made for the Welsh war in 11th Edward I. by the parliament of Salop, the sums paid to Kirkeby were deducted

* Parl. Writs, i., 884, 887.

(1 Parl. Writs, 10), so that it appears his mission so far failed as to make a parliament necessary.

That the plan recently introduced, of allowing the freeholders to attend by deputy, greatly facilitated this admission of the towns, is manifest. Possibly it suggested their admission. The Crown could not require the attendance of so numerous a body; if it was regarded as a duty, they would have had an easy excuse for refusing; if it was regarded as a privilege, the Crown could not be called upon to admit so inconvenient a concourse.

It has been suggested, and with great appearance of reason, that the towns first called to parliament were those within the royal demesne, and which were tenants *in capite* of the Crown. When a charter of incorporation was granted by the king, the corporate body became tenant *in capite*, and owed such suit and service as was prescribed by the form of the gift. The inhabitants, the individual corporators, did not hold of the Crown, but of the corporation, by a peculiar tenure called *burgage holding*. If they had been tenants *in capite* they would have been entitled to the privileges and subject to the duties of the lesser barons or freeholders, and consequently would at all times have been summoned with the county landowners; at first they would have been so called in person, and would have joined with them more recently in electing the knights of the shire.

We can have no doubt that the History of Representation in Scotland was similar to that which we have just been tracing. But one step of its progress is much better ascertained from having been later made—the representation of the counties; and in another particular there is a material difference in the history of the two parliaments; for the towns were represented, while the lesser barons, or freeholders, attended in person.

It is possible that as early as the end of the

thirteenth century the towns sent delegates, or representatives, to parliament; for in 1294 we find Fordun mentions that John Baliol called together in a parliament "majores tam cleri quam populi." As, however, no mention is made of the barons, possibly the "majores populi"* may mean the nobles. It is nevertheless to be remarked that in the treaty of marriage which this parliament made with France, the negotiation assumed to bind not only the prelates, earls, and barons, but also the towns (*communitates villarum regni*).† Edward I., too, summoned the states to meet at Perth, in 1305, and they gave full powers to ten persons, of whom two were barons, and two were to appear from the "*commune*," which most probably meant the boroughs; and this would show that they had been represented in the parliament which chose the delegates. But that Robert Bruce called the Burghs cannot be doubted, because we find in the parliament held 1326, there were assembled "totus clerus, comites, barones, et universi nobiles, *una cum populo*," which last expression occurring after "universi nobiles"‡ can only mean the burghs. The right of the burghs to attend all meetings of the estates was therefore clearly established, at least as late as the beginning of the fourteenth century.

Accordingly, the laws of Robert I. purport to be made by the "prelates, freeholders, and haill community," which must mean the burgesses, because the freeholders had at that time no representatives (LL. of Robert I. Title, chap. 34). In 1327, at the parliament held at Edinburgh on the king's liberation, the whole commons, as well as the prelates and nobles, are recited as composing it, and there are given the names of the thirty-seven burgesses who attended, choosing eleven of their number to represent them in the negotiation.§ Again, the statutes of Robert II., 1372,

* Scotichron, lib. xi., cap. xv.
† Ib., lib. xi., cap. xvii.
‡ Fordun, lib. xiii., cap. xii.
§ Rym. Fœd.

purport to be made by the consent of the prelates, earls, barons, and burgesses. The earliest laws, those of Malcolm II., who was king in 1004, purport to be made by the king and the barons. Those of William the Lion (1165) are stated to have been made by the king's consent, the prelates, barons, knights, and free-holders; those of Alexander II. (1214) by the king and nobility, and sometimes the judges are also mentioned. But till the reign of James I., and the year 1427, the lesser barons, as well as the greater, attended in person. In that year an act was made allowing them to absent themselves, provided they sent representatives (1427, c. 102). This condition they never fulfilled, but ceased to attend in person. Accordingly, the parliament consisted of the prelates, greater barons, and burgesses, without any county members, until the year 1587, when James VI., there having twenty years before been made an ineffectual law for the purpose of executing the statute of James I., made a more stringent one, which had the desired effect; and at the same time affixed a qualification of 40*s.* a-year of lands holden of the Crown, and of residence within the county. Both of these circumstances were required to confer the elective franchise for choosing a commissioner or county member. The sum of 40*s.* amounts to £3 of our money. An act with the same object had been passed (1567, c. 33), but it affixed no qualification to the elective franchise, and imposed no fines.

The Scotch parliament, in some very material respects, differed from the English. The different estates always sat and voted together as one body. The business to be brought before it must first be assented to by a committee of the three estates, called *Lords of the Articles*, appointed till Charles I.'s time by the estates, but generally composed of the king's ministers. The king's assent to laws was not deemed essential to give them force. The parliament, or estates, used to make orders on the king himself; to direct the arming

of troops and their levy; to appoint governors of garrisons; to make peace and war; to prorogue and assemble of itself. Nothing could be more complete than the misrule and the anarchy which grew out of these extensive powers; and the prerogative of the Crown was reduced to a shadow, unless when it could raise a military force, or obtain the aid of one faction of the barons against another. The accession of James VI. to the throne of England produced the consequences of the imperfect federal union; but in no other instance was its operation ever so entirely beneficial to the less powerful nation; for if the prerogative of the Crown was enlarged, and that of the parliament restricted, the country began for the first time to enjoy the blessings of a regular and tranquil government.

The History of the Irish Parliament is meagre and obscure. No statutes of it remain before the 3d of Edward II.; but many inquirers have considered it certain that as early as the reign of Henry II., when the country was first settled, or so far conquered as to be supposed settled, there was a council of the ruling class, the Irish within the pale, who were the portion of the people subdued by and immediately connected with the English. The Irish without the pale, living in a very rude state, and in continual hostility with the English, were treated by them in all respects as foreigners and as enemies. As the defence against them, and also the incursions made upon them, required constant precautions on the part of the English and their subjects within the pale, the holding of councils became in all probability a matter of necessary precaution. At first the leading men formed this council of the king's governor, deputy, or lieutenant. Afterwards the districts, or counties, into which the country was divided (only twelve as late as Henry VIII.'s time) sent representatives, as did the towns, which were thirty-four in number. A dispute appears to have existed between the English government and the Irish

people as early as Edward III.'s reign, about the right of the latter to have their own parliament; for they then asserted it, and refused to send representatives to England. In the reign of Henry VII. an act was passed (called Poyning's law, from the name of the lord-lieutenant) requiring that the king's previous consent should be obtained, at the calling of each Irish parliament, to all the bills which should be propounded; and in Queen Mary's reign this restraint was extended by a prohibition to entertain any matter whatever during the course of the parliament, unless it had been approved by the English Privy Council. These laws, as is well known, were only finally repealed in 1782. But even during their existence, the power of taxing in all its branches was exercised by the Irish parliament exclusively; no English act was ever allowed to impose any new burthen upon the people.

It is a singular circumstance in the history of representation, that the country in which it was first known is not the one in which it has been carried to its greatest perfection. Our records do not enable us to trace the constitution of the English or Scottish Parliaments so far back as we can follow the meeting of the French States-General. We have records of unquestionable authority as far back as the reign of Charlemagne, which show how his courts, councils, malla, or placita were composed. All those who held under the Crown were to come twice a-year, in summer and autumn;* and an old author, contemporary with that prince, speaks of "Cætera multitudo" and "Cæteri inferiores personæ."† But early in the ninth century we find proof of the presence of persons who, though not elected as representatives, were yet chosen by the people to fill the places which gave them admission to

* "Ut ad mallum venire nemo tardet, primum circa æstatem, secundum circa autumnum" (Capit., A.D. 769, cap. 12, ap. Baluz., i., 192).

† Hincmar, de Ord. Pol., c. 35.

the estates. A writ exists of the year 819* requiring each count to bring with him twelve echevins, scabini, or rachinburghers, if there were so many in his domains, and if not, to fill up the number of twelve by the better kind of people (de melioribus hominibus ejusdem comitatus). Now, although this left the choice of the substitutes to the counts, the echevins were all elected by the people. For we have also an ordinance of 829, the Capitulary of Worms, which, from the purport of it, is plainly declaratory, or made to confirm the existing laws; and it requires the *missi* to remove all bad echevins (malos scabinos), and replace them with good ones, chosen "totius populi consensû."† There is also in the Alemanic law a prohibition to hear any causes unless with the assistance of an assessor chosen by the people. It is plain, therefore, that so early as the beginning of the ninth century there was a popular infusion occasionally in the king's mallum, or council.

But the French States at no time attained the regularity of the English Parliament, and there never was anything resembling the representation of counties, the barons always attending in person, and never in any instance choosing representatives. Nor does such a representation appear at any time to have been known either in Germany or in Spain, or in any other country than Great Britain and Ireland, and perhaps the Gothic kingdoms of Scandinavia, where the peasants sent deputies.

In tracing the origin of Representation we have unavoidably gone at length into that branch of the subject which is most interesting to the people of this country, and have been led to examine the most important part of the early history of the English and Scottish Constitutions. There was no other way of avoiding endless repetition when we come to treat of

* Capit. ii., cap. ii., ap. Baluz., i., 605.

† Capit. 829; Cap., cap. ii.; apud Baluz., i., 665, 1216. The same law is often re-enacted in the capitularies.

the British form of government than by thus anticipating a portion of that important subject.

The questions upon which it has been necessary to touch have given rise to sharp controversies; the natural zeal of the antiquary having often been exacerbated by the additional vehemence of the political partisan. Among the combatants on either side, the two principal champions of opposite doctrines respecting the earlier or later completion of our parliamentary system are Mr. Petyt and Dr. Brady, the former having published his *Rights of the Commons Asserted* in 1680, and the latter his answer to it in 1683. There have been many other combatants in this warfare, of more or less name. But in treating the whole subject I have consulted only the true and safe sources of information,—the Statutes themselves and the Parliamentary Writs, both as published by the Record Commissioners; the early Scotch Statutes, unfortunately not yet given by the Commissioners; and the Capitularies of the French monarchs.

CHAPTER IV.

REPRESENTATION—ITS BENEFITS.

The great change in political affairs which we have been tracing to its origin could not be introduced without effecting a most important alteration in the whole structure of Government, and enabling men to frame societies both upon a very different scale and upon very different foundations from those of the Commonwealths in ancient times. We are now to consider in detail what those alterations are which this invention of modern times has effected in public polity; and we shall best perform that task by examining the qualities and the tendencies of the Representative principle.

1. The first and most striking property of the Representative principle is, that it enables a free or popular government to be established in an extensive and populous country. This we have already illustrated, by referring to the state of the ancient Commonwealths, and the imperfect devices which became necessary for the purpose of enlarging the limits of the State without giving up Republican Government. Beside the other defects of the Federal Union, its manifest tendency to create mutual estrangement, and even hostility, between different parts of the same nation is an insuperable objection to it. Small communities are exceedingly apt to conceive against their neighbours feelings of rivalry, jealousy, and mistrust. Each individual bearing so considerable a proportion to the whole society, that the worst personal prejudices and passions are nourished; and the most ignorant and violent of the people being the most numerous, the tone of the whole takes the turn which these bad passions tend to give it. If any illustration

of this truth were wanted, we have only to remind the reader of what we found in the history of the Italian republics. The government always is influenced by such feelings, most of all in a Democracy, but in a great degree also in an Aristocracy, and even in a petty principality. For the rulers themselves in such a narrow community partake of the general sentiment, even if the public opinion should not sway them. Whoever would see further proofs of this position may be referred to the ancient Commonwealths of Greece. As a Florentine hated a Siennese worse than a German or a Spaniard, or even an infidel in modern times, so of old did an Athenian hate a Spartan or a Theban worse than a Persian. Now the Federal Union, by keeping up a line of separation among its members, gives the freest scope to these pernicious prejudices, feelings which it is the highest duty of all governments to eradicate, because they lead directly to confusion and war.

It may further be doubted if the existence of a small community is of itself desirable for the improvement of society. Undoubtedly, great public spirit may be expected to prevail in such a nation, and the feelings of patriotism to be excited, or rather to be habitual with the people, each individual of whom feels his own weight and importance, instead of being merged and lost in the countless multitude of a larger State. But this advantage is more than counterbalanced by the attendant evils of petty, contracted ideas, which such a narrow community engenders, and especially by the restlessness which arises among all the people, when each takes as much interest in the State's concerns as if they were his own. There is thus produced both an over zeal, a turbulent demeanour, a fierce and grasping disposition, hardly consistent with the peace of the community; and also a proportionate inattention to men's private affairs, inconsistent with the dictates of prudence, as well as a disregard of the domestic ties,

equally inconsistent with amiable character and with the charities of private life.

It would further appear that limits may be much more easily set to the bounds within which a Federal Union can be established, than to those within which a representative system may conveniently exist. For the central government in a Federacy is of necessity feeble. It is more like a congress of ambassadors from many nations than the council of one nation. Each person is only animated with zeal for his own State, while none feel for the general welfare. But a Representative government may extend over the largest dominions, and they who compose it may exercise an authority at once vigorous and considerate, thinking for the advantage of each portion of the community, as well as consulting for the welfare of the whole.

2. But it would be a great mistake to suppose that the only benefit of the Representative principle is that one which strikes us first, the enabling a popular government to extend over a large territory. It is not even the greatest of the advantages derived from the principle. The next benefit which we are to consider is more important; it is the prevention of mob government by the substitution of a small body of men to whose hands the whole power of the people is confided. This at once puts an end to the tumultuous meetings, and to the rash proceedings of large popular assemblies. Mere clamour can no longer carry the day, and riot is banished from the public assembly. The bare diminishing of the numbers composing such assemblies would produce this effect. If, instead of 5,000 or 6,000, only 200 or 300 were to meet, although they were chosen, and chosen indiscriminately from the same body, so that the two meetings must be composed of the very same materials, yet the proceedings of the lesser number would be much more orderly, and their resolutions much less the result of sudden impulse, and the dictate of momentary clamour or enthusiasm.

3. The Representative system is of exceedingly great benefit to good government, as well as to public tranquillity, by enabling the people to meet and transact business in smaller bodies than must assemble if they acted for themselves. The reduction of the numbers assuredly would of itself be a material advantage, even if the same matters were discussed before such a meeting, and the same powers were exercised by its members as when the whole body, unrepresented and undivided, carried on the government. A small number of persons are always more orderly in their proceedings, and less under the influence of clamour and of sudden impulse than a great number even of the same persons; and they who, in a private interview, will listen to reason and decide rationally, will, under the contagious excitement of a multitude, shut their ears to all common sense, and resolve on the most absurd things. Therefore, if the supreme power could be subdivided, so as to let one small meeting dispose of one matter, and another of another, or if, by a kind of federal plan, every matter should be discussed and determined by the whole community meeting in small bodies, and communicating the results of their several deliberations to a central council or executive magistrate, a far more rational course would be taken than if the same individuals were congregated in one large body and decided in its assemblies. So if on each material question the different constituent bodies in any State having a Representative government were to instruct their deputies, and those deputies were strictly to follow their directions as ambassadors rather than representatives, a very great improvement would be made upon the ancient constitution of popular government. As a Representative system it would sin against all the fundamental rules; but compared with the old system it would be a substantial improvement.

4. This, however, is not all: the lesser body of representatives so chosen are more responsible than the

greater body who chose them. They act more under the influence of being personally answerable for what is done. Each person in a small body feels that he is looked to by his fellow-citizens as the author of the measures adopted. In a large meeting the divided responsibility leaves each individual almost free.

5. But the smaller body is not composed of the same materials as the larger; and now we come to the greatest quality of Representation. The multitude of ignorant and foolish persons greatly overpowers the small number of well-informed, and reflecting, and wise persons in every community. The whole citizens meeting to discuss measures, decide according to the sense, or rather the folly, the lights, or rather the ignorance, of the multitude, which forms necessarily the great majority of the assembled people. But the representatives are chosen; they are selected; they are set apart from the mass, because of some qualities that distinguish them from that mass; these qualities are such as give a pledge of their greater fitness for the functions of government. In one man it is greater wisdom; in another, more ample wealth; in a third, higher birth; in a fourth, greater information. In almost every one integrity or respectable character is a ground of choice, and prudence or discretion, itself a virtue, the parent of some and the guardian of all the virtues, is hardly ever left out of the account in determining the choice of those persons who are to act for the community in the conduct of their most important affairs. Hence the influence of the ignorant, the heedless, the stupid, the profligate, is reduced to a small amount in the conduct of the government; for, generally speaking, the same persons who, being unfit to be themselves trusted with power, would ill-use it, are very capable of making a good choice enough of a representative. The temptations to act recklessly or corruptly are much less powerful in the election of a representative than in the government of the State.

6. This leads to another and almost an equal advantage of the representative principle. The one matter brought before an elective body, a body whose functions are confined to the choice of representatives, is very much more simple and easy than the various matters which are brought before the rulers of a country. Those men who would be wholly unfit to be trusted with the decision of a question touching foreign policy, or jurisprudence, or even domestic economy, may be tolerably well able to select a person as their representative. It requires no great degree of information, and no profound acquaintance even with man's character, to tell which of several candidates is the abler, the more discreet, or the more respectable person.

7. The persons thus chosen are on that account, on account of the qualities which recommend them to the electors, less likely to be corrupt, to rule for sordid interests, and act with profligate views. But their small number, their individual responsibility, render them much more likely to be afraid of acting corruptly, how little soever they may value virtuous conduct or unsullied reputation for its own sake. The same persons who, among a vast multitude, might take a bribe, would feel afraid of being bought were they members of a small body. Thus, the electors may be bribed; and yet the men returned by such foul means, nay, the very men who obtained their election by bribery, may be very far from venturing to act corruptly in administering the trust thus bestowed. Very little reliance could be placed on the purity of a multitude in deciding upon questions, the determination of which certain possessors of large wealth had an interest in affecting by corrupt means; yet the same wealthy persons would find it a very difficult matter to tamper with the representatives of that corrupt body. If any one doubts this, let him only consider how often the charge of bribery is preferred against constituent bodies, and generally with the absolute conviction of the imputa-

tion being true, however rare the cases may be in which its truth can be proved; how extremely rare it is to see any charge, even to hear any suspicion flung out, against any member of the representative body. I have sat in parliament for above fifty years, and I never even have heard a surmise against the purity of the members, except in some few cases of private Bills promoted by Joint-Stock Companies. I had been considerably upwards of a quarter of a century in parliament before I ever heard such a thing even whispered; and I am as certain as I am of my own existence, that during the whole of that period, not one act of a corrupt nature had ever been done by any one member of either House. I question if any one election had ever taken place during the same time, in which many electors had not been influenced by some corrupt motive or other in the exercise of this sacred trust.

8. It is one of the most important benefits of representation that it secures the faithful and regular discharge of the political functions. Wherever the people at large are to rule, they have no chance of constantly applying to the discharge of their public duties: the detail of administration cannot interest them; it demands too much time and patience to master; and their ordinary business, the daily labour to gain their daily bread, renders constant attendance at public meetings impossible. We may remember the difficulty of obtaining the attendance at Athens which the law required; even among that nation of politicians it was necessary to bribe the citizens with pay, and sometimes to compel them by force. The division of labour never was more happily applied than by the representative principle, which, leaving to the people the office they are fit for, gives to the deputy the work he can best do; and thus secures it being both done and well done.

9. It must also be borne in mind that the most

effectual security for the people's rights and liberties is not their exercising the whole power directly, but their having a select body of able watchmen to guard those invaluable possessions. A control over their watchmen, the power of naming them, the power of removing them, is all that the safety of their freedom requires them to possess. Any power beyond this, even if they were qualified to exercise it well, would be wholly useless for the purpose. The deputies can just as effectually protect them. But in fact the deputies can more effectually protect the liberties of their constituents than those constituents can themselves. A very large body of men are much less likely to be always on their guard against encroachments. They soon prove weary of watching, and begin to slumber. They are easily split into parties by intrigue; and they are far from being proof against corruption. Their measures to resist a common enemy, foreign or domestic, are never framed with such wisdom or executed with such vigour, as a small body of able and experienced men can bring to the performance of this task. Those men are ever on the watch: they have no other duties to discharge, no other business to follow. Thus the liberties of the people are more secure in their hands; and the power of the people—the only power they can safely exercise, that of election—is more likely to be preserved, than if the whole government were in their own hands.

10. It is not an unimportant circumstance in the consideration of this subject, that the representative system enables the scattered inhabitants of the country to bear their part in the administration of public affairs, whereas the congregated masses of the people in towns could alone partake of the government, were each man to appear on all occasions in his own person. Unless upon rare emergencies the country people cannot be brought together. The townsfolk are always easily convened. You may assemble the countryfolk once in

a year, or once in three years, to choose delegates; oftener they never can be convened. The townspeople are always ready to attend any meeting. Giving all, both town and countrymen, an equal right to attend, nay, summoning all to attend alike, has no kind of effect. To the townspeople, who live within a few paces of the place where the meeting is held, attendance costs nothing; to the peasant, who has to give up a day or two of his work, the attendance becomes impossible: he will come now and then to choose a delegate, but never on ordinary occasions. Hence in all republics, before the representative principle was known, the whole government of each State was necessarily in the hands of the towns. That principle has enabled the other half, or more, of the people to take their equal share in the administration of the common interests of the whole State.

11. Finally, it is the great, the inestimable advantage which this principle secures, that it gives the people their share in the government, without the inconveniences and mischiefs which we have seen that it avoids. The direct exercise of the supreme power by the whole people is indeed a scheme of polity which may at first sight appear to give them more sway in the administration of their concerns, than the scheme which for a certain time transfers the supreme power to their representatives. But when duly considered, it should seem that this is really not the case. In the *first* place, it is an abuse of words to call that an exercise of power by any person which is only the appointing him to a function he is utterly unfit for. Who would deem it any power conferred upon him to be allowed the privilege of cutting off a sick man's limb, or trepanning one who had his skull fractured? But, *secondly*, if the mischiefs of the ignorant and unskilful performance of these functions all fall upon the party himself, the abuse of terms is much more glaring. Who would call it a restraint upon his

liberty to be precluded from mangling his own limb, or driving the saw of the trepan into his own brain? The good of the whole is the end of all government: any power inconsistent with that is bad for the whole body of the State. But independently of such views, which belong to another consideration of the subject, when we speak of power being vested in certain hands, we always mean a rational investment—an investment in hands capable of exercising the power bestowed. *Lastly*, it is much more safe and beneficial for the people themselves, and more beneficial with a view to their power itself—the only point now under consideration—that they should not govern directly and in the mass. If trusted with the whole direct power, or indeed with any portion of the government directly, we may be assured that they never can long retain it. The certainty of its abuse, and the inevitable mischiefs which its unskilful exercise must entail upon the State, will, after a short time, assuredly occasion a revulsion; and the direct power will be transferred to other branches of the community, or to an oligarchy at home, or to a sovereign at home, or to a foreign State; and it will be transferred entirely, without any control being left in the people's hands—even that control which they are well capable of exercising. The memory of the mischiefs which their incapacity or corruption occasioned, will be the security of whatever tyranny is founded upon the ruins of the democracy. Even when the body of the people did not formally exercise the functions of government, yet possessed too constant a control over their rulers, so that the salutary operation of the representative principle was impeded, and the popular voice ruled too directly, we have seen the fatal effects of their misgovernment in propping up the most rigorous tyranny, and stripping the people of all control, all voice in the management of their concerns. The mob influence, which was the mainspring of the Reign

of Terror in France, enabled Napoleon to usurp the government, and make it absolute, exhaust the country by his conscription, and lay it at the feet of foreign nations by his wars. The cruel executions which the people called for in England, and the influence of their fanaticism over the Long Parliament, prepared the way first for the military despotism of Cromwell, and then for the restored tyranny of the Stuarts. The French people would have been more powerful in the just sense of the word, and would have retained their sway longer, had they been content to wield only the power which they were fit to exercise; and the English would neither have required a restoration in 1660, nor a second revolution in 1688, had they been satisfied with electing representatives, and abstained from interfering with the exercise of the trust which they had bestowed.

It thus plainly appears, that nothing can be more senseless than the opinions of those who have regarded the only liberty enjoyed by a people living under a Representative Government, as that which they have during the election of their delegates. Rousseau, with his accustomed shallow dogmatism, says, that the English are free then only; at all other times "they are slaves"—"they are nothing."* This is not even true of the people's power, as we have seen; but Rousseau confounds liberty with power. The loss of all direct power, if it were ever so complete, would not necessarily work a loss of all liberty. The rights and the freedom of the people would be protected by their deputies, and all encroachments of arbitrary power would be effectually prevented. The only risk would be of those deputies forgetting their duty, abusing their office, and joining with the usurpers, oligarchical or monarchical. But this is prevented by the limited character of the trust, and the people retaining the power of dismissing the representatives

* *Cont. Social*, liv. iii., ch. xv.

who have betrayed them. This is all the power which it can ever be necessary to leave in the people's hands in order to protect their liberties; and we have shown how much more effectually this protection is afforded by the representative, than by the direct, exercise of their authority.

Such are the great and manifest advantages conferred by the Representative principle, such the evils of obstructing its full and entire operation; and on these accounts it is that we justly and confidently consider it as the greatest of all the improvements which have ever been made in the science of government and legislation.

CHAPTER V.

REPRESENTATION—VARIOUS MODES.

HITHERTO we have only considered the Representative principle generally, and examined those qualities which belong to it in whatever manner it is applied. But there are various modes of this application, and it is of great importance to explain these. Some of them, though productive of important effects, and tending to modify, by extension or restriction, the principle itself indirectly, yet do not directly extend or impair it. Others have a direct influence in impairing it, and rendering it less beneficial and less severe.

I. To the former class belong the principle of double elections, the method of combined choice, and the manner of giving the vote.

i.—The principle of double election appears to have been borrowed from the complicated voting of the Venetian and other Italian governments. Possibly it might have been suggested by the ancient Federal system, in which the people chose magistrates, and those magistrates appointed deputies, who voted in the congress. It is, indeed, not impossible that the mere exercise of the Representative power itself may have suggested this refinement; because the deputies elected by the votes of the people, too numerous to vote upon measures themselves, vote on these measures, and so it may have occurred that the people were too numerous to vote in the election of deputies, and that therefore they could delegate to a smaller body the choice of those deputies. But be its origin what it may, the plan consists in the whole body of electors choosing a smaller number to exercise for them the power of

choosing representatives. This principle was adopted in France under the two Republican Constitutions which were established in 1791 and 1795.* It was continued under the Consulship and the Empire; it was retained after the restoration, 1814 and 1815, in the constitution under the charter; and it was only abandoned in 1830, upon the change which then took place. The assemblies which chose the electors were called the "Primary Assemblies." Those which chose the deputies were called "Electoral Assemblies or Colleges." The Directorial Constitution of 1795 gave one elector for every two hundred of the Primary Assembly. The constitution of 1799 and 1802 had a much more complicated principle. The commune (or parish) chose a tenth of their number, which was the Communal list; these chose a tenth of their number to form the Departmental list; and these again a tenth to form the National list; so that the number of the primary electors was reduced to one in a thousand; and this thousandth were only eligible to the senate, tribunate, and legislative body by the choice of the public functionaries and senators together.

All such double, or more than double, elections are fundamentally bad, and proceed upon a principle radically vicious.

1. They are wholly inconsistent with the representative principle. If a person is fit to choose an elector, he is fit to choose a representative. He may, as we have seen, be wholly unfit to decide upon a law or a measure of policy, and yet be fit to select some one to act for him in discussing and determining those important matters. But if he is only supposed fit to choose the elector, how is the line of his qualifications to be drawn? It is much easier to determine whether or not any given person is fit for the functions of a representative, than to determine his fitness for an elector; because it is difficult to decide what qualities

* It was not part of the Constitution of 1793.

are especially required for making a man a good elector. This whole process assumes that a person may be fit for being an elector who is not fit for being elected; but it fails to show how that line is to be drawn.

2. The chances of bribery are much more numerous where the electoral body is small than where it is large. The whole people select a few, and these few having no function whatever to perform except choosing others, they are set up as a kind of mark at which all the missiles of corruption may be launched. They are sure to be persons of less respectability than would be chosen as representatives, because the trust reposed in them is incomparably less important, and requires less capacity to execute it. Besides, their office is only occasional and temporary: they feel in proportion to its less duration less responsibility; therefore, they are in every way more exposed to temptation, and less likely to resist it.

3. But a most serious evil of the double election is its tendency to place the power in the hands of a minority of the community. If all the electors of a district choose the deputy there is a possibility, but not a great likelihood, of the minority of those representatives being persons returned by great majorities of the voters, and the narrow majority being returned by small majorities. But this becomes much more probable if, instead of choosing the deputy directly, there is an intermediate election. Suppose a county or department having two thousand votes to be divided into twenty districts, each of which by a Primary Assembly chooses one to the electoral College. If the twenty electors are divided in the proportion of eleven to nine, as to the candidate for the representation, and all the eleven are chosen by fifty-one to forty-nine in these primary assemblies, and the nine are chosen unanimously in theirs, then the candidate who has only five hundred and thirty-nine votes is

elected to represent the whole two thousand voters, and the other is rejected who has one thousand four hundred and thirty-nine. This, of course, being an extreme case, is not likely to occur; but in various degrees it is very possible; and the double election gives every facility to intrigue, corruption, and stratagem on the part of the minority. All the districts in which the people are nearly unanimous will be neglected, left unassailed as hopeless; and the effort will be made to bring over or intimidate enough to constitute a majority in those districts where the numbers are more nearly balanced. In each of these the purchase of a few votes will secure the return of an elector, and also the return of such a representative as the great majority of the people would reject. This risk, too, is wholly independent of the other risk arising from corrupting the electors. We are now supposing the electors to be perfectly incorruptible, and that the effort is made in the primary assemblies alone.

But although these are the serious objections to Double Election, yet it has no direct operation in diminishing the power of the people, or vesting in an oligarchy their influence over public affairs and the course of the government. The government is still popular in every sense of the word, and the people are still secured in the possession of their rights, because they have the power in their own hands of choosing persons who will elect men deserving their confidence, and men removable by the next choice of electors in case they betray their trust. To instruct deputies on all points of their conduct is impossible, because it is impossible to foresee all the events that may occur after an election, and before the several measures come under the consideration of the representatives. But to instruct an elector is perfectly easy, because the only point is the simple one of who shall be sent to represent the district, and that choice is to be made immediately, and before any change of circumstances can

have taken place. Hence the power of the people, and their control over the representatives, cannot be said to be materially diminished by the double election, nor the responsibility of the representatives be much lessened. Certainly, whatever difference is made in both must be unfavourable. The power of the people may be a very little diminished, and the responsibility of the representative a very little lessened.

ii.—There is another way in which the elective process may be modified; there may be a Combined Choice. One body only of the people may be allowed to name a certain number of candidates, and out of these another class may select the representative. Thus all persons whatever may choose ten candidates, and all persons of a certain income may out of these select the representative. There are not such serious objections to this as to the former modification; but it is exposed to another objection, which does not necessarily arise against the former. The choice of so many as ten or more candidates (and they must be numerous to give the selecting class any real power of choice) gives rise to much confusion, and to the great risk of votes being thrown away, and of a minority combining to choose their candidate, while the majority are voting without concert. But the main objection is this, and it is insurmountable: the class which chooses the candidates, or eligible persons, may usurp the whole election, and exclude the other class altogether. They have only to choose a single candidate who is at all fit for the place of representative, and all the rest plainly and certainly unfit, and the power of selection among the names on the list becomes a mere nullity.

iii.—The manner of taking the vote is the only other modification that requires examination of the class of contrivances now under consideration; and this becomes very important with a view both to the right exercise of the elective power, and the preservation of the peace and the morals of the community.

Three points under this head require our attention,—the distribution of the representation, the protection of the voter, the prevention of error, corruption, and expense.

1. The principle which ought to govern the distribution of the representation is, as nearly as possible, to apportion the same number of representatives to the same number of inhabitants in any district. I say as nearly as possible; for it does not seem an essential requisite to fair representation, that it should be rigorously proportioned to the numbers of the people. On the contrary, there are manifest objections to this equal distribution in a country of which the population is very unequally dispersed, and which has towns of great magnitude, as well as extensive districts thinly peopled. Suppose the rule of equal distribution were applied to England, its five hundred representatives would be so divided that the metropolis would return fifty-five. So large a body always on the spot, and representing constituencies so numerous also, in the immediate neighbourhood of the parliament and the government, would have an influence exceedingly dangerous to the balance of the constitution and the independence of the legislature. The case of Paris is still stronger; for though its inhabitants are much less numerous in proportion, the excessive power and influence of the capital in France is one of the great practical evils of that country. In either case the formation of a party, and the acting in concert, is far easier when so many members come from the same place; and to this must be added a consideration common to both countries, but of especial weight in France, that the natural influence of dense masses of people, independent of their weight in the representation, seems to warrant rather giving them a smaller proportion of members than is answerable to their numbers. But it cannot be doubted, on the other hand, that the giving to a comparatively insignificant town like Kendal or Harwich, of ten or

eleven thousand inhabitants, as many representatives as to the West Riding of Yorkshire, with its million of people, is a gross absurdity, and contrary to the very first principles of the representative system. The electoral system in France is free from all possibility of this evil; for the deputies are chosen by districts, without any regard to towns.

Another principle ought to govern this distribution: each class and interest in the community should be represented. Suppose there were one important branch of trade confined to a single district, and the number of inhabitants in that district did not warrant its returning a deputy with a view to population; still it should be represented with a view to the trade driven by it. So, important professions should be represented; and important classes of properties. Our English system sins against all these canons, and sins grievously. It allows but one test, the ancient distribution of men into towns. Harwich and Kendal are represented—the former by two members, the latter by one only—because these are towns; while districts of the country containing ten times as many inhabitants are allowed about the fifth part of a member each. Again, property is the qualification of a voter, and yet only one kind of property is regarded; so that the greatest mass of the property next to the land, the eight hundred millions belonging to the public creditor, are wholly unrepresented.

2. The protection of the voter's independence in his exercise of the franchise is an object of primary importance. As workmen and labourers are under the influence of their employers, tenants of their landlords, and shopkeepers of their customers, it has been thought by many reasoners necessary that we should enable these dependent classes to give their votes without any control; and the obvious method of doing this is said to be the power of secret voting, or the ballot.

The advantages of this mode of proceeding are obvious; and they are exactly applicable to the case: the remedy is a specific; it is directly calculated to arrest the evil. But there are considerations of importance which have not always been sufficiently considered by the advocates of the plan. Of these one of the most important is this: that the elective franchise is in the nature of a public trust or duty, and ought, therefore, to be executed under the responsibility of the functionary, the elector's, conduct being known. It is certain that a much more important vote than the elector's is the representative's; and it is as certain that the representative is exposed to equal disturbing influences in the discharge of his duty. How many men dread the frown of the court! How many professional men are exposed to serious injury from the possessors of power! How many naval and military men are dependent upon the favour of the government, and liable to be all but ruined by its hostility! Yet no one can seriously contend that votes in parliament should be given secretly; because the constituent has a right to know how his representative votes. It must be admitted that the reason for publicity in the elector's case is not so strong; yet is there a reason, and of nearly the same kind. For all the community are interested in the honest and enlightened exercise of the right by each voter; not to mention that where there are any classes excluded from voting, they are represented by the classes which possess the franchise, and have a right to know how it is used.

But it is another argument against the ballot, that men can never be prevented from trying to influence those under their control; and that, do what you will to prevent it, they will always seek to discover how their workmen, tenants, and tradesmen have voted. Indeed, the whole argument for the ballot assumes that they will do so: it proceeds upon the assumption that one class has power over the other, and is resolved by

all possible means to exert this power. Then how can the unfortunate voter, who has secretly given his support to the adversary of his patron, conceal his act, except by a course of falsehood—a course maintained from one election to another? Cicero's description affords but a slender recommendation. "The ballot," says he, "is a favourite with the people, because it gives men an open countenance, while it conceals their thoughts, and lends them a license to do whatever they please."* Surely these are very powerful reasons for disliking such a plan, unless there be a certainty, not only that the evil of compulsion is generally prevalent, but also that the remedy will prove quite effectual.

Both of these positions, however, appear to be more than doubtful. It is certain that the advocates of the ballot have both exaggerated the malady and overpraised the cure. It is, perhaps, nearly as certain that the adversaries of the ballot have considerably exaggerated the evil consequences of it; but chiefly because, like its advocates, they have overrated the effects it is likely to produce. The truth really is, that very many of the voters, even in the classes for whose protection the ballot is proposed, would vote exactly in the same way were their vote given ever so secretly. The circumstances which create the influence so much dreaded have a most direct and universal operation, in producing a disposition of the inferior to follow the course of the superior party. Almost all tenants take an interest in favour of their landlord, and have a pleasure and a pride in supporting the candidate of his choice. The majority of workmen always feel disposed to support the party of a kind and considerate employer; farm labourers, without any exception, do so; and the greater part of manufacturers or artisans would follow the same course; though certainly these last are not so much under the employer's influence. Shop-

* "Grata populo est Tabella, quæ frontes aperit hominum, mentes tegit, datque eam libertatem ut quid volunt faciant."

keepers are the class to whom the secrecy would give the greatest protection, and in their case the ballot would have most effect. As for tenants, even the few who would go against the landlord could not be effectually protected; because whatever tenant was suspected would either be required to pair off with an adverse voter, or to abstain from voting altogether; and thus the whole protection of the ballot would be defeated. Some other supposed advantages of the ballot we shall have occasion to consider under the next head.

3. The means of preventing expense, corruption, and error, are next to be examined.—A well-devised system of registration seems one of the most effectual. If care is taken to scrutinize each claim at the time when there is no contest to excite the passions and prevent just decisions, the process of voting will be very short and very simple. But all this difficulty, and the necessity for a register, assumes that the franchise is confined to particular classes, of which we are hereafter to discourse. Appointing a variety of polling places, and having all the elections over in one day, is a most wholesome expedient for preventing expense and checking intrigue. Excluding all but residents from a vote is another device most useful for attaining the same end, and there can no reason whatever be given for allowing any person to vote in more than one place. The attaching a vote to all property of one kind, as our law does, and to property of another description only giving the right when combined with residence, is contrary to every principle.

The prevalence of bribery is the most difficult subject with which we have to deal, in considering the defects of the representative principle; and the ballot has been proposed with much confidence by sanguine men as the best means of attaining this most desirable object. I own that I cannot at all adopt this opinion. Suppose the wish for a seat to remain unabated—

the means of corruption to continue unimpaired—the disposition to bribe and the readiness to be bribed being the same, I conceive that the secret voting would only give rise to an arrangement much more likely to extend corruption than to restrain it. A class of *vote-contractors* would be formed, who would bargain with the candidates, or with their agents, or with their friends, to receive so much in the event of the election being won, and nothing in the event of it being lost. Suppose such an agent bargaining to receive £1,000 on these terms, he immediately sets about agreeing with three or four sub-contractors, each of whom is to have £100 or £150 if the election is won, and not otherwise. These sub-contractors have an interest in bringing as many votes as they can buy for five-sixths of the sums agreed upon, taking to themselves the remaining sixth; and each voter whom they bribe is to be only paid in the event of success. Thus every contractor, sub-contractor, and voter is interested directly in the success of the candidate; and a set of agents is created such as no election on the old plan can ever call into existence. Who can for a moment doubt that this system of corruption must prove more active and more universal than any that now exists?

A plan has sometimes been adopted of disfranchising places against which general corruption has been clearly proved. This seems a very rude and clumsy remedy; and it is objectionable further on the ground that the innocent are punished, both now and hereafter, with the guilty; and above all, that it is a remedy which never can be applied to the corruption exercised in large places. There were above two thousand persons proved to have been bribed in one Liverpool election. Did any one ever dream of disfranchising that large town? And yet no such extensive bribery was ever shown to have been carried on in any other place. It must always be borne in mind that the franchise is

bestowed on a place, not as a favour or as a privilege to its inhabitants, but in order to obtain from it the contribution which is due towards the formation of a legislature for the whole country.

A very large extension of the franchise appears to promise the most effectual and the safest remedy. If there were no small places entitled to return members —if no place or district under five thousand voters were allowed representatives—there would be little bribery known; and one of the greatest mischiefs of popular government would be, if not wholly removed, yet very greatly diminished. It must, however, be borne in mind that, even where the constituency is large, in any severe contest, where parties are nearly balanced, as a few votes would turn the scales, there is the great inducement to obtain this small number by undue means. This consideration affixes a limit to the effect of extending the franchise, as a security against corruption.

CHAPTER VI.

REPRESENTATION—RESTRAINTS ON VOTING.

None of the expedients which we have been describing for modifying the principle of representation has any tendency to render that principle more impure, to impair its force, or to interfere with its use in supporting popular government. On the contrary, all but the Double Election tend to preserve, and purify, and improve it.

II. We are now to consider modifications of a very different nature, the object of which is to impair and, as it were, to adulterate the representative principle, rendering the political system in which they are introduced less popular.

1. We have examined the modification, which consists in giving to the greater portion of the people the power of selecting candidates. This modification belonged to the first class; but it would have belonged to the second class, if the choice of candidates had been confined to a select class of the community, or persons of a certain income, and the people at large could only choose out of the number so selected. In like manner, if the people, by direct or by double election, choose the eligible persons, and the executive government select from them, the modification belongs to the class which we are now considering, unless the people are enabled to choose absolutely the candidates, and can protect themselves by choosing only a single really eligible person for each vacancy.

2. Another modification by which the right is restricted, is the requiring certain qualities to be possessed by the persons chosen as representatives. Some-

times a greater age has been required than that at which the law allows persons to manage their own affairs. In France, after the Restoration, no one could be returned to the Chamber of Deputies who was not forty years old. Sometimes the person elected was required to be of the class of electors. This was the law in Scotland before the year 1832. A property test or qualification, however, is the most common. In England, all but members for the universities and peers' eldest sons must have £600 a-year clear in landed property to sit for counties, and £300 to sit for boroughs; the eldest sons of persons qualified for county members being presumed to be themselves qualified. It must be obvious that nothing can be more absurd or more inconsistent with itself than this qualification; for while the constitution of parliament recognizes the right of the towns, that is the trading classes, to be represented, it compels them to choose for their deputies men who have property in land. As well might it compel counties to choose men in trade for their representatives. A man may have a million in the funds, or as much capital invested in commerce, and he is unfit to represent a commercial town, unless he has also £300 a-year in real estate. This law, it is needless to say, has always been evaded. The member being only obliged to have his qualification at the two moments of his being elected and taking his seat, obtains a conveyance of property, which he, immediately after taking his seat, re-conveys.

It must, however, be added, that nothing can be more speculative or less practical than the great objection which some extreme reformers have taken to the representative qualification. They think it excludes men of the middle or inferior classes from parliament, and they therefore propose not only to abolish this qualification, but to pay the members for their services, as they were paid in ancient times. The only result of this would be a considerable increase

of bribery. The payment might have some effect, though but little, if any, because the persons of that class would hardly ever choose to elect one of their own body, from the jealousy which always prevails of one another, and leads them to prefer their betters. But the removal of the qualification would have no such effect at all. What place, what body of men, would choose artisans or day-labourers to represent them, were the right of voting ever so general? And what artisan or small tradesman could afford to give up his calling and his livelihood, in order to manage the affairs of the country? That men in such circumstances would be more accessible to bribery as representatives than men of independent fortunes, needs not be proved. It is self-evident. Their being eligible, therefore, and being in consequence elected, would be no advantage whatever to the community.

3. But the most important of all modifications in restraint of popular rights, is the affixing a certain qualification to the electors, and thus confining the right of choosing representatives to a certain class of the community. The origin of this is partly the pretended alarm about popular violence at elections, partly and chiefly the notion that the people at large cannot safely be trusted with a voice upon the public concerns. The former reason was put forth in the fifteenth century (8 Henry VI.) by our parliament, when they wished to exclude the poorer freeholders from exercising the franchise, the members for counties having before that time been chosen by the County Court, composed of all freeholders without exception, whereas the new statute confined the right to persons possessed of 40*s.* a-year, equal to as many pounds at this day. The same alarm has also been constantly given as the reason for our courts of law leaning against general rights of voting in the choice of corporate officers in towns; and its operation had, previous to 1832, by degrees deprived all but a select few

among the townsfolk of the elective franchise. The Scotch parliament, in the fifteenth century (1469), by a single act confined the right of holding corporate offices to the existing magistrates, who were empowered to fill up all vacancies in their number; and these magistrates alone chose the members of parliament. The towns of the United Provinces took a similar course a century and a-half later; and it has been pretty generally pursued in other parts of the Continent.

But the true and the operative reason for this important restriction is the belief that the people cannot be trusted. They who so think, and unfortunately they have always been a great majority of the persons possessing influence in the legislatures both of France and of England, have therefore devised a means of confining the right of voting to what they consider as the trustworthy portion of the people, those possessed of a certain amount of wealth, and those possessed of certain corporate rights. The wealth, or the rights, are not so much the matter deemed to be essential as the respectability of the parties. The pecuniary circumstances are supposed to indicate a certain degree of station, and it is thought that persons of this station, having some stake in the country, but still more having some information, some knowledge of affairs, and some integrity, will not abuse the right of choosing representatives.

In France the payment of a certain sum in direct taxes is the criterion of respectability. A considerable sum is now required. In the first constitution (1791) only the payment of three days' labour (about half-a-crown) was required for the electors in the Primary Assembly; but two hundred days, or about £12, for those of the Electoral Colleges. This criterion is not liable to many of the objections which lie against the English test; but it is objectionable, as making the rights of the constituent body depend upon the revenue

laws, which may at any moment be so changed as to disfranchise or to enfranchise whole classes of the people.

It is needless to dwell upon the great inconsistency of the English plan, as exemplified in the line which is drawn to sever the voters from the community at large. Thus wealth is taken as a criterion of respectability, and yet a man with a million of funded property, or a million lent upon bond or mortgage, has no vote, while the renter of a hovel is qualified if he pays £10 a-year to the owner. But the gross absurdity is the taking wealth as a criterion, and affixing so small an amount as makes it no criterion at all, even considering wealth to be, as it is, in certain amounts a true test. If it is to be taken as a criterion, the qualification should be raised, so as to indicate that there is wealth enough possessed to indicate respectability. The £10 rent, or the 40*s.* freehold, really is as bungling a test as a standard of a recruit's fitness for the service would be, which should require that no one be enlisted under four feet high, with the view of providing that the soldiery should be strong enough to go through their duties. Another gross inconsistency of these qualifications is, that while we pretend only to take them as tests of respectability, we no sooner apply them than we forget this, and regard the property as something sought after for its own sake; else, why require such property to remain vested in the voter? If the possession of certain pecuniary means at any one time showed him to be of that class which may safely be entrusted with the elective franchise, does his loss of these pecuniary means degrade him to an inferior class, and make him who was trustworthy last year not to be trusted this? Are his industry, sobriety, information, judgment, all gone with his money? At least, let us be consistent with ourselves, and admit that, having once been proved to be a fit person, he should be recognized as such ever after. The rule, to

have any colour of consistency with itself, should be—"Once a voter always a voter."

But it seems, if possible, more absurd to adopt such a test, or any test at all, unless there is an absolute impossibility of obtaining the quality itself directly, or at least by much easier methods. If the possession of wealth is allowed to be a criterion of sense and information, all must admit it to be liable to error, as the most silly and ignorant of men may have it. So, if it be taken as an evidence of industrious and sober habits, or of general respectability, the same uncertainty must be allowed to attend it. But education actually received, is a direct proof that the thing in question belongs to the individual. So attending regularly an institution for mental improvement is incompatible with ignorance, and with an idle, dissipated life. But we reject these qualifications altogether; just as if a chemist were, in search of gold, to take aqua regia, in which peradventure it might be dissolved, or peradventure it might not, and pass over a piece of the virgin metal itself or the grains of gold dust.

The exclusion which our test effects of some most meritorious and valuable members of society is a grievous evil, and affords a very strong objection to it. All lodgers and boarders, all who have no house of their own, are excluded from the borough representation. The most ingenious artisans—the men whose expertness and industry are the props of our commercial greatness—almost all who have carried the arts to so great perfection as rivals the finest performances of any age or country—the whole body of our mercantile navy, of those whose lives are spent in driving our vast commerce, braving all dangers by their firmness, and overcoming all difficulties by their matchless skill—most of our literary and scientific men, of those whose unwearied labours illustrate their country, and adorn their age, and elevate their race,—all are disfranchised by a law formed for the avowed

purpose of drawing the line between ignorance and intelligence. No doubt it does draw the line, and it leaves information on the excluded coast.

But there is a very serious objection to any qualification which depends on property alone. If, as has been already stated, it is low, no test is afforded of respectability; and if it is too high, vast numbers are excluded. In truth, the low qualification which admits the greater number, is wholly objectionable on the principle upon which alone all such tests rest, and it either should be much higher, when it would create an oligarchy—or it should be much lower, when it would cease to be a qualification at all either for good or for evil. The mischief of a low qualification is not to be denied or got over. It creates a set of men in every place, limited in number, who have the sole possession of the elective right, and who are thus set up as marks singled out for the arts of the dealer in corruption. There seems no reason to expect that any legislative measure or any judicial severity will ever apply an effectual cure to this crying evil. As long as the place of representative is an object of all men's ambition, many wealthy persons will seek it by means of bribery; and their zealous friends will bribe where themselves might be disposed to refuse an honour so purchased. As long as the means of corruption are possessed, and are thus applied, small constituencies will be the victims of the temptations afforded; and the only real remedy is greatly extending the number of voters, or, if that is impossible, greatly increasing the size of the electoral districts into which the country is divided. If we retain a superstitious veneration for the names of those districts; if we cannot bear to see a new division of the kingdom for political purposes; if our old local associations are too powerful to suffer the outrage of such changes—it is all very well, and we gratify our romantic feelings; but then, let us not shut our eyes to the price which we

pay for this sentimental indulgence; it is the perpetuation of the most corrupt practices by which a free people can be debased and degraded; and the spreading of an immorality so glaring, that the lovers of liberty itself are fain to doubt whether popular government may not really be bought too dear at such a cost as the sacrifice of public virtue.

It deserves to be further considered by those who are so friendly to exclusion, and so desirous of "walking in the old paths," that qualifications are an invention of after times, having had no place in the original constitution of this country, or indeed of any country which early in the feudal history adopted the system of general assemblies. The barons, great and small, were originally summoned to the council, colloquium, or parliament, without any distinction. Afterwards the townsfolk were called upon to appear, sometimes at first in person, as in France upon several occasions; generally on the Continent, and always in England, to send representatives. The lesser barons, in this country, and afterwards in Scotland, were called to send deputies, instead of attending personally. That those freeholders both in England and Scotland all originally voted without any exclusive test whatever, we have the most positive evidence. But there is every reason to believe that originally the townsfolk also voted without any exception. This appears certain; because there is no record in our history of any one law restraining the franchise and fixing a qualification. No one was, indeed, anxious in those times to be elected; and that which was reckoned a burden to receive, it could not be deemed an advantage to bestow. But in hardly any case has the older or common law drawn distinctions and affixed proportions or sums. It would be hard to name any other instance than dower, which was taken from the civil law and founded upon a natural and rational partition of the property into three parts, of which the children should

have one, and the deceased's nominees another. The most ancient constitution of this and other countries, therefore, was wholly unacquainted with the doctrine of qualifications.

But this would be nothing like a decisive reason against them, were there material benefit to be derived from their introduction into any given constitution. It may at first be thought evident that this must depend on the kind of constitution into which it is proposed to introduce them. A little more attention, however, to the subject will satisfy us that it is not so, and that the arguments for and against them are the same, of whatever form of government it is proposed to make them a part. The representative principle can never in any scheme of polity have an object other than admitting the people to a share in the government. The share may be greater, or it may be less; and its amount will depend wholly on the power which, through their representatives, they are permitted to exercise. But it will not at all depend upon the manner in which those representatives are chosen, or the proportion of the people allowed to choose them. We may suppose a case in which the representatives of the people should have hardly any real influence. If the patrician body or the sovereign had the sole right of originating all measures, or if the power of the purse were taken from the popular assembly, or if a majority of the three estates, the patricians and the sovereign, for example, could legislate for the whole, it is plain that the government would only in name be popular; and it would be as little popular if every man of twenty-one chose the representative as if only men having a hundred a-year, or paying ten pounds a-year in direct taxes, had the elective franchise. In like manner it would be a popular government if the representatives alone could originate measures, or if the sovereign and the popular assembly could legislate for the whole;

and it would be popular whether all the inhabitants, or only a certain proportion, were the electors of that assembly. If indeed the qualification were so high as to throw the choice into the hands of a very small number of the richer and nobler classes; if, as was the case in England before 1832, a majority of the Commons were returned by the patricians, or by those under their immediate control, the government would become aristocratical; but this would not be in consequence of the qualification, properly speaking; it would be in consequence of the people being wholly excluded, and their representatives being chosen for them by the aristocracy, and not by themselves. It is not a Representative Government at all in which such a choice is made. The aristocracy choosing deputies does not constitute a Representative Government. If the British House of Commons were abolished, the government could in no just sense be called Representative, merely because the Irish and Scotch Peerage were represented by deputies of their own choice. We have seen that the popular choice is an essential condition.

We mean by a Representative Government one in which the body of the people, either in whole, or in a considerable proportion of the whole, elect their deputies to a chamber of their own. But there are degrees in this. Although, therefore, the qualification in the sense in which we are now taking it, would not alter the frame of the constitution according as it was pitched higher or lower, it might make that constitution more or less popular in a considerable degree, and increase or diminish the influence of the patrician order, and to a certain degree of the sovereign, according to that scale. If the common people were wholly excluded from voting, it would be easier for the influence of patronage, wealth, rank, to exert itself in elections; and the two other estates would thus obtain some kind of influence over the deliberations of the popular assembly. It is equally evident that this

ought never to be permitted beyond the narrowest limits, that is to say, the weight which wealth, rank, and power always must possess in every community. To restrict the right of voting for the purpose of augmenting this weight is wholly contrary to the spirit of a mixed government, because that government assigns to each order its own place; and if the patrician body are firm of purpose, they have quite sufficient protection for their privileges in the direct power which they possess of rejecting any measures proposed by the other bodies, and of proposing any measure of their own. If each of the three estates, or of the two, supposing only that number of estates, possess not a veto on all measures, the government is only in name mixed. In that case the amount of the qualification either becomes indifferent, when the government is in reality aristocratic, or it ought to be extremely low, perhaps not to exist at all, when the government is in reality democratic, though it would still be democratic though the qualification should be very considerable.

What, then, is the advantage of a legitimate kind sought for in a qualification,—and honestly sought, —not for the purpose of individually aiding the schemes of the other orders, but of fairly working out the principle of the government? It is confined to these two particulars, the securing a better choice of representatives, and the preventing corruption. The former consideration depends upon our distrust of the intelligence of the people at large; the latter upon our distrust of their virtue; and both upon our distrust of the influence which the more intelligent, more virtuous classes can exercise over the inferior members of society. As for the pretence that confusion, or riot, or any kind of disorder, or even the least inconvenience, could result from the utmost extension of the franchise, no one can now affect to be influenced by it. The Representative principle at once

precludes the possibility of any such mischief, because it enables us to subdivide the voters in any degree required by the convenience of the public. Let us therefore consider the only real advantage ascribed to the qualification, a good choice of representatives, and a check to corruption.

1. Some reasoners have assumed that if all the people were to elect, the classes who are without any property, being the most numerous, would overpower the proprietary classes, and return representatives who would interfere with the rights of property, throw all public burdens upon its owners, perhaps decree its confiscation and division. This assumes first a grosser degree of ignorance and thoughtlessness than can well be supposed in the people of any civilized community, who must know that the only security of society, and the best security for the labourers themselves, arises from the security of proprietary rights. But it also assumes that there is to be a union of the working classes all over the country in order to return this majority. Then, if they are likely to combine for the purpose of indirectly effecting the confiscation of property, why do they not now combine for the purpose of seizing upon it directly? For assuredly they possess this power in every country, and yet in none is there any more alarm felt respecting such a measure, than there is an apprehension of the horses in the country combining to kick, or the oxen to gore men to death.—Again, the argument assumes that the other orders of the State are to remain passive spectators of the measures of spoliation, and neither to exert themselves before they are adopted, nor to reject them afterwards when they are presented or their acceptance.—Lastly, the argument assumes that wealth, rank, talents, learning, virtue, are to have no influence whatever in determining the choice of the common people, who are supposed to be so inferior in all these qualities, and who assuredly are so in some of

them; whereas many persons have fears of a totally different kind, and dread their being too much under the sway of their superiors. I well remember, when I said to my dear friend, the late Duke of Bedford, that his zeal for Parliamentary Reform was all the more creditable to him because it was so disinterested, he having then four close seats and two others which were almost secure: "Not so very disinterested," was his reply; "for I doubt not I should influence the return of a considerably greater number of members if the suffrage was universal"—which, however, he did not altogether approve. The truth is that the alarms of those who expect a new set of men to be chosen were the whole people, instead of a sixth part of them, as at present, represented in parliament, are founded upon a profound ignorance of human nature, and of the relations in which men stand to each other in every social system.

At the same time it must be admitted that some restriction of the franchise would be most desirable, in order to diminish the influence of profligate adventurers, mere traders in politics, and to lessen the risk of popular clamour carrying bad and obstructing good measures. The test of a good education is the best by far, nor does it seem of difficult application. My Education Bills of 1838 and 1839 introduced this as a qualification for voting in parish school meetings; and I then declared it to be one advantage of its adoption for this purpose, that it might so easily and so safely be extended to the Parliamentary franchise.

2. That the extension of the franchise tends to the increase of bribery cannot be denied. Nor is there any answer to this great difficulty, except what is to be found from considering that, if the qualification must be raised for this reason, we have no alternative but raising it so high as to exclude nine in ten of the present rate of voters both in England and in France. But it is most important to observe that the extension

of the franchise brings along with it the great and effectual remedy for all corruption. If the universal admission of the people to choose their representatives, is accompanied with the abolition of all constituencies under five or six thousand voters, the most effectual check will be afforded to all corrupt practices. It is indeed true that the number of the voters is the real cure, and not the mere extension of the franchise, because a numerous body of a higher description would be the less accessible to bribery. But the division of the country into larger electoral districts—that is, into larger bodies of voters—is greatly facilitated by admitting all classes to vote; and this should be an inducement to confer upon the people the benefits which such an extension in other respects is calculated to secure.

CHAPTER VII.

CANONS OF REPRESENTATIVE GOVERNMENT.

From the inquiries in which we have been engaged within the compass of the last four chapters certain general principles may be deduced as governing the theory of representation; and it may be convenient here to state these, as the Canons which may be said to rule the system.

I. The deputy chosen represents the people of the whole community, exercises his own judgment upon all measures, receives freely the communications of his constituents, is not bound by their instructions, though liable to be dismissed by not being re-elected, in case the difference of opinion between him and them is irreconcilable and important.

II. The people's power being transferred to the representative body for a limited time, the people are bound not to exercise their influence so as to control the conduct of their representatives, as a body, on the several measures that come before them.

III. Any proceedings on the part of the people tending to overawe or unduly to influence their representatives upon any given question, though no outrage should be committed, and only an exhibition of numerical force be displayed for these purposes, are contrary to the whole nature of representative government, and in themselves revolutionary, being criminal in the people, and doubly criminal in any of their representatives, who thereby commit a flagrant breach of duty.

IV. The best sort of representation is the direct, in which the deputies are chosen by the people, and not by electors whom the people choose.

V. The combination of any other choice or veto with the popular choice is greatly to be reprobated, as an impairing of the pure representative principle; so the representative body itself should have no power of expelling its members except for infamous offences, or the non-payment of lawful debts.

VI. The selection of representatives ought to be free, and the whole community open to the choice of the electors, without any restriction whatever upon eligibility, except the period of infancy, or conviction of infamous offences, or actual insolvency declared by judicial sentence.

VII. The distribution of the representation should be such as to secure representatives of all the great classes in the community, which are sufficiently numerous, in the combined ratio of the importance of the classes and the numbers comprised in them.

VIII. Population alone cannot safely be taken as the criterion of numbers chosen to represent, and any arrangement is to be reprobated which should give one very large town the choice of too many representatives, by giving it representatives numerous in proportion to its population.

IX. Population should not be so far neglected as to give great inequality to the electoral districts, thus enabling a small body of the people, by their representatives, to control those of a much larger body.

X. Districts should be formed for representation so large as to prevent the corruption of the voters by the candidates or their friends.

XI. The choice of representatives should be, as far as possible, entrusted to all persons of full age, unconvicted of infamous offences, who have received a good plain education; and if a property qualification is

adopted, no change or loss of property ought to disfranchise a person once recognized as fit to exercise the right.

XII. The manner of voting should be such as to protect the voter's independence; but the secret vote would in most cases have little influence, and that chiefly in the case of tradesmen; while it is liable to grave objections, and is a positive evil if the suffrage be not nearly universal.

CHAPTER VIII.

APPLICATION OF THE REPRESENTATIVE PRINCIPLE.

THE principles which have been laid down respecting representation, and the observations made respecting its operation on the civil polity of states, are of universal application. They are not confined to one form of government, but extend to every kind of constitution into which the representative system can be introduced. It is, however, manifest that only two forms of government are compatible with this system—Democracy and Mixed Government. If it be introduced either into a pure aristocracy, or a pure monarchy, the constitution must, of necessity, undergo a great change from the admixture thus effected by the partial addition of the popular scheme of polity.

1. In a Democracy the representative principle has both the freest scope, and is the least exposed to danger of either being impaired or destroyed. The most serious risk to which it is exposed arises from the impatience of the people, and their disposition to take back a portion of the power which they have entrusted to their deputies, by controlling them in its exercise on questions of a peculiarly interesting nature, contrary to the second of the Canons given in the last chapter. The peculiar importance of any measure, either of general legislation or of administrative policy, affords no excuse for this interference; because each successive occasion will never fail to assume a character of extraordinary importance as the present always does with the bulk of mankind, who habitually fall into the error common to our moral and our natural optics, of mistaking near objects for great ones. That

no occasion will ever arise where in a Democracy, as in a Mixed Government, the gross misconduct of the representative body will justify popular interposition, cannot be affirmed. But these occasions are extremely rare, and they are of a revolutionary nature; they are occasions that justify resistance to the established government. In a democracy it may safely be asserted that no occasion will justify the people acting for themselves, and in defiance of their representatives, that would not justify resistance to the sovereign in a monarchy. The cases are precisely similar, and rest on the same principles.

2. The representative system is exposed to another risk from the efforts of powerful individuals and parties to render the government less democratic, and substitute an aristocratic influence for the unmixed dominion of the people. These attempts are almost certain to take one direction—the interference with the representative functions, and introducing popular control. As long as the system remains entire, and the deputies exercise the powers of government, their selection by the people, their responsibility to their constituents, and the powers possessed by the representative body, remove all chance of any faction succeeding in changing the government. But it is otherwise if the supreme power, or any portion of it, be resumed by the people. Then the arts of intriguers, and the corruption to which they resort, make the chances of success far greater. It is also very natural to consider that the representative system supposes in a pure democracy a large extent of territory, else the people would most probably have retained the government in their own hands. Hence popular interference means not the interference of the whole people, nor even of the majority, but the excitement and agitation of some two or three great towns, which may be worked upon by the arts of crafty men; and thus hold out a prospect of enabling an aristocracy, or an oligarchy,

to obtain the preponderating influence in the State. Therefore, such designs are always sure to be directed towards the resumption of power by the people, and the impairing, perhaps the final destruction, of the representative system.

3. The third danger to which the principle is exposed in a democracy, is the interference of parties or powerful individuals with the exercise of the right of election. By means of factious arts and delusions, and by corrupt practices, the choice of the representatives may be so influenced as to weaken the hold of popular principles over them, and thus to prepare the way for a change in the government after infringing the purity of the representative system. As, however, this course cannot be effectually pursued in a State where there are no privileged orders, from the difficulty of obtaining the consent of the bulk of the people to their own degradation, and from the watchful jealousy which they usually show of all interference with their choice of deputies, though they are far from being as constantly on their guard on the subject of measures which they often scantily comprehend, we may assume that this is by no means an imminent hazard, to which in a democratic commonwealth the representative principle stands exposed.

It may here be observed, that the restriction of representation, by excluding large classes of the people from the elective franchise, by no means renders the government other than democratic. We should be guilty of an abuse of ordinary language were we to term such a constitution aristocratic, or oligarchical, or mixed. If we look, indeed, to the great authorities on these subjects, we shall find them all treating a government as republican, by which they usually mean democratic, provided any considerable portion of the people exercise, by their delegates, the supreme power. Thus the Commonwealth men of the seventeenth century, like the old Romans, never were very nice in

weighing how large a proportion of the people influenced the government, or how long their delegates retained the trust in their own hands, and with how little reference to the wishes of the nation at large they exercised their powers, provided the supreme power was in the hands of many, and not of a single chief. The Long Parliament was elected by the decayed burghs, as well as the great towns and counties. Almost all the negotiations with Charles I. were confined to the powers which the Parliament should possess, and turned not upon the mode of its election. The Independents, when they obtained the chief sway in the House, framed a plan of government which only dealt with the parliament's prerogative; and it was not till 1654, under the Protector's constitution, that the decayed burghs were disfranchised, and their members given to the counties.*—So, too, the Dutch republicans deemed their government a commonwealth long after the principle of self-election had been introduced into their cities, provided the Stadtholder's prerogative was kept subordinate to the authority of the States.—In like manner the republicans of France were much more anxious about preventing a return of the royal family, and a revival of the patrician order, than about the extension of the right of election to the whole body of the citizens. The constitutions which in those countries were formed to the exclusion of large classes from all direct influence on the government, were all Democracies, though not of a pure and simple kind.

As for reasoners upon purely speculative grounds, they appear to have been equally indifferent to the question, except only that some, as Harrington, in sketching the outline of an imaginary commonwealth,

* This had been proposed, August, 1648, by the Council of Officers. In Cromwell's *Instrument of Government* the universal qualification was the possession of £200 (equal to £500 now) of any kind of property.

have given extensive rights of election.* In all the discourse of Algernon Sidney upon Government, we see constant indications of a rooted dislike to monarchy, and ardent love of democracy; but not a sentence can we find that shows the illustrious author to have regarded the manner in which the people were represented as of any importance; while Milton so entirely summed up his democratic opinions in the "refusal of one man and the having no House of Lords," that he was intoxicated with joy at the revival of the Long Parliament after Richard Cromwell's deposition, and strenuously contended for the people's representatives being chosen for life.† Both those great men might well take for their motto the lines so appropriately quoted by one of them as describing his faith—

"Manus hæc inimica tyrannis
Mente petit placidam sub libertate quietem."

It would be difficult to find a more remarkable illustration of the progress which political philosophy has made since those days, than the disregard of the representative system, in all but its name and outward appearance, by the most illustrious friends of popular government in the age when the freedom of England was, after a long struggle in the senate and in the field, finally won.

In a Mixed Government, whether aristocratical or monarchical, the consideration of most importance which offers itself respecting the representative system is its tendency to derange the balance of the constitution and convert it into a democracy more or less pure. This arises from the power of the people being called forth and concentrated by their representatives; and from the undeniable fact, that when freely used against the privileges of the other orders in the State,

* He gives it to every man of thirty years old. But his Commonwealth has also a law against the acquisition of unequal property, and for the rotation of offices.—(*Oceana*, 101.)

† *Prose Works*, p. 441, *et seq.*

these are exposed to a great risk of being overpowered. Hence, for their own defence, the sovereign or the patrician body, or in a government like ours, both the one and the other, have always endeavoured to obtain an indirect influence beyond their peculiar privileges, by gaining some hold over the popular representatives, in order to avoid the consequences of a collision, which might ensue in case they were driven to use their direct influence over the course of the government. The efforts of which I am now speaking are those made to bias the choice of the electors and occasion the nomination of persons who, being connected with themselves, are sure to favour their interests and views rather than those of their constituents. For there is another source of influence much less direct than this, which is perfectly legitimate, and founded in the nature of things. To exemplify the distinction between these two kinds of influence, it may be observed, that the possession in this country of close or nomination boroughs by the government, or by the peers, before the year 1832, gave the sovereign and the aristocracy a direct sway over the assembly in which the constitution required that only the representatives of the people should sit, and only the people should rule; while the wealth, rank, talents, and virtues of the patrician body (the Natural Aristocracy) gave that body, and the respect for the Crown gave the sovereign, an indirect influence besides, which the change of 1832 has not been able materially to affect.

There are various ways in which the two other estates may directly obtain weight and even control in the popular body. They may interfere in elections by the use of corrupt means to bribe or to intimidate the electors; and they may exert their influence without any corruption, by using their authority, their natural weight with the people, in favour of certain persons devoted to them and to their body. They may also use their influence with the representatives

themselves after their election. It is not impossible, though not very common, for several peers to have their agents in our House of Commons: I hardly remember a parliament in which there were not some few instances of this connection. The sovereign must also have many members in his service, unless, as in France, the ministers are excluded from votes; but even there they are suffered to have seats and to speak in both the Chambers. When the sovereign, as has frequently happened both here and in France, is obliged to take into his councils a ministry of whose persons or principles he disapproves, he has generally had a trusty band of "king's friends"—men for the most part attached to his service, by holding military or household places, and who act neither as representatives of the people by whom they are elected, nor as supporters of the actual government, but on behalf of the royal person and authority. It is, however, incomparably more difficult now to influence the representatives in the English parliament than it formerly was; and therefore the attempts of the other two orders, or estates, must be chiefly made to influence the elections. Nor are these attempts as easy as they formerly were, because the conduct of the representatives is now more under the control of their constituents.

This interference of the Crown and of the Aristocracy is quite contrary to the genius of the representative system, and is a violation of any mixed constitution into which that system enters as a component part. It is all the worse for not being reciprocal. The people have no means of influencing the proceedings either of the aristocracy or of the sovereign, other than through the choice of representatives whose powers are conferred on them by the constitution. If ever the people endeavour to use their peculiar power, the force of numbers, to overawe the deliberations of the aristocratic assembly, or the councils of the sovereign, there is an illegal act done, for which pun-

ishment ought to be inflicted. If the monarch or the patricians exert their influence to corrupt or intimidate the constituents, or to seduce the representatives from their duty to their constituents, there is an illegal and a punishable act also committed. There is even an irregular, unconstitutional, and reprehensible act done, though it may not be punishable unless as a breach of the privileges of the popular body, if any of the other two estates interferes in any other manner, any manner not strictly speaking illegal, to influence the choice of the representative, or his conduct when chosen. The true theory of the mixed government is, that each of the orders or estates should remain separate from the other, and each possess, independent of the other, its own peculiar powers and privileges.

But there is nothing reprehensible or contrary to the spirit of the system in the other orders gaining influence over the representative body, either indirectly through the electors or directly with the deputies, by means of the Natural Aristocracy and of the reverence for the sovereign. This must ever give those estates a very great weight in that body; and to this must be added, the regard for the stability of the mixed constitution, and, consequently, for the continuance and security of the other orders, as well as their own, which largely influences the people and their deputies. They regard the patricians and the sovereign, not as enemies to be attacked, or as adversaries to be struggled against, but as partners in the same concern, with whose co-operation the good of the whole community is to be sought and worked out.

However, the great security and influence of the patrician and royal estates, and their best protection against the third estate, should the exercise of its power be apprehended as overwhelming, is to be found in the legal rights, and privileges, and prerogatives of these other estates. It is of the essence of a mixed government that each estate should have

powers independent of all the others, and in the exercise of which it is unaccountable and supreme. But if each estate is not also possessed of some effectual strength, some actual force, wherewith to vindicate its authority when assailed, or enforce its rights when disputed, the government is only in name mixed, and the impotent estate being reduced to a cipher, is as if it had no existence. Now there are two kinds of protection for the authority of the estates which possess less strength, less physical force, than the popular body. The one is the reluctance of that body, and especially of its representatives, to bring on a crisis dangerous to the existence of the government, the desire which all the estates must have in common to avoid extremities, in order to consult the general interest.

The other protection is that which must only be resorted to in cases of extreme necessity, but the means of resorting to which must always be possessed, and the possibility of the resort never to be lost sight of—the exertion of physical force. Nor must this be reckoned a desperate chance. The sovereign has of course always the power of protecting his prerogative in such extremities, by using the force which the constitution entrusts to him, calling upon the civil functionaries to abide by him, and appealing to the military power for his defence. The Aristocracy are far more helpless; but even they are by no means without defence. They form a small body themselves with their families; but they are a body of the greatest courage and fortitude, making an important nucleus or central point round which all may rally who hate injustice and would resist oppression, as well the oppression and injustice of the many as of one—of the people as of the prince.. The retainers of the Patrician body must always be very numerous, and they are in general exceedingly attached to their patrons. A large, and well-armed, and high-spirited force could always be

raised by this class in their defence, were matters urged to a crisis by the encroachments and usurpations of the people. Besides, in a mixed government where there are three estates, the Sovereign would infallibly take part with the privileged orders. It must further be observed that a very considerable portion of the people themselves would prefer this, the side of law and justice, to joining in the excesses of popular usurpation. All men of property must be averse to such a revolution as could only be brought about by the overpowering force of the multitude possessed of no property at all; and it is manifest that the proprietors of all classes form a very numerous body in every civilized community. Take in England only the owners of stock; there are ascertained to be above half-a-million of these; and they must almost all be averse to popular revolution. They and their connections would make a very numerous body to rally round the existing order of things, in the event of any attempt to overthrow it by lawless force.

It is needless to repeat that the case here put is an extreme one: the insurrection of the people, by themselves or their representatives, against the established constitution—their attempting by the power of their numbers to overthrow the lawful and undoubted privileges of the other orders in the State. The case is one of a revolutionary kind; the act is, like that of resistance on the part of the subject, only to be justified by the necessity which leaves no alternative. The right of resistance is the foundation, and it is of necessity the foundation, of all popular, all mixed government. The encroachments of the Sovereign upon the rights of the subject, his ruling in defiance of the law, and trampling upon the liberties which the constitution secures to the people, is a full justification of resistance to his authority. The encroachments of the people upon the rights of the Sovereign, their seeking to destroy his lawful authority, and trample

upon the prerogative recognized by the constitution for the good of all, is a full justification of his using force in defence of his authority. As the People cannot resist by the forms of the law, because the Sovereign is supposed to set it at defiance, so he cannot constrain the People by these forms when their proceedings are altogether lawless. As it is not every encroachment of the Sovereign that will justify resistance, but, on the contrary, the evils of the struggle are always to be set against the advantage of restraining the wrong-doer—so it is not every Popular encroachment that will make it lawful for the Sovereign to use the force with which he is entrusted in order to put down lawless proceedings. The evils must in both cases have become intolerable before the resistance is to be attempted, and the probability of success is to be weighed, in order that a hopeless attempt may not involve the community in distress and confusion. Above all, in either case, the parties whose rights are invaded must first exhaust every peaceful, and orderly, and lawful means of obtaining redress, and must never think of arms until laws have failed to protect them.

The most important application of this principle, as the most beneficial use of resistance, is its tendency to prevent one power in the State from encroaching and usurping upon the others. When the monarch is aware that his infraction of the laws, and his use against the constitution of the force which is committed to him for its support, will be the resistance of the people in its defence, he is deterred from harbouring unlawful wishes, or from embodying them in treasonable designs. When the people are aware that their force, if used to subvert the established government, would be divided against itself, and that they would encounter a vigorous opposition from the other orders, they are not likely to follow leaders who would betray them to their ruin.

But it may be said that the view here taken of the right of resistance when the people are resolved to change the form of their government, is contrary to the undoubted maxims that all government is for the people's good, and that the people have a right to change it if they please. To this the answer is at hand. The people have that right; but it is of a revolutionary nature, and assumes society to be resolved into its elements. As long as a certain form of government is established, the presumption is that the good of the whole, and especially of the people, is best consulted by its maintenance, and requires it to be supported. The different orders in the State can have no other rule to guide them. All must act as if their duty to the community bound each to maintain its own rights and privileges. All must assume that the existing order of things is right; and until overpowering necessity compels their submission, all must resist encroachment and change.

CHAPTER IX.

RESERVED POWERS OF THE PEOPLE.

NOTWITHSTANDING the people's surrender of their share in the supreme power by the choice of representatives, there are certain Powers which must be Reserved to them from the necessity of the case and the nature of the thing. These are principally three in modern times: the influence of the Press; the influence of Public Meetings; and the influence of Juries in the administration of justice.

SECTION I.—*The Press.*

While the legislative power is confided to the popular representatives in whole or in part, according as the Democracy is pure or mixed, and while the executive power is entrusted either to hereditary or elective magistrates, there is an important influence, almost amounting to a direct power, exercised by the discussion of all public measures through the Press. This influence depends entirely upon the effects which such discussion produces upon public opinion, that is, upon the minds of the people, by affecting whom it affects their representatives and their magistrates, sometimes exciting them to adopt measures for which the people feel exceedingly anxious, sometimes deterring them from pursuing courses to which the people feel exceedingly averse.

It must be confessed that this interference operates as an obstruction to the movements of the representative system. As far as it is effectual, it may be considered as a resumption of the delegated trust,—a breaking in

upon the discharge of the duties confided to the deputies. If a number of persons should employ any one to act for them as their advocate, and then prevent him from pursuing the course which his judgment pointed out as best for their interest, by meeting and passing resolutions against it, or by threatening to revoke his commission, we should be entitled to pronounce this a very unfair and a very injudicious proceeding; treating the advocate ill, and consulting badly for their own interests. Nothing, indeed, would justify it but a conviction that he was betraying his duty, or falling into manifest blunders in the discharge of it. But any resolutions passed for his information and assistance, any suggestions tendered for his guidance, subject to his approval, would be both fair and prudent. So the people, and they who on their part discuss public measures, would be wrong in exceeding similar bounds were the conduct of the government, including their representatives, free from all suspicion, whether of treachery or of imbecility.

But in practice these bounds are constantly overleaped, and the excess is both more likely and less hurtful in exact proportion as the people are not fully represented by their choice of deputies. If there be large classes not represented at all, then such interference can never be the subject of reprehension; it is not against the representative principle.

We may further observe, that the influence of the Press is much more slowly effectual in causing the adoption of measures which are popular favourites, than in delaying or preventing it. The occasions must be rare indeed, the unanimity of the Press and the people unbroken, their feelings deep seated and loudly expressed, to drive the government into a measure adverse to its opinion or wishes. By slow degrees alone it is, generally speaking, that public discussion can cause the adoption of plans originating more in the people's desire than in the wishes of their

deputies or their rulers. On the other hand, the clamour excited against an unpopular measure has not seldom stifled it at the first, and much oftener delayed it for a while, operating in either case at the moment.

In one respect the Press is constantly operative, and produces very great good, with hardly any admixture whatever of evil. The great and immediate publicity which it gives to all the acts of the representative and of the ruler affords a most salutary check on the conduct of both, and prevents many errors being committed through ignorance or inadvertence. But this benefit of the Press can hardly be reckoned any influence or power exercised by the people. That influence or power consists in the control exerted by the printed and published and universally circulated opinions or wishes of the community. The representative and the ruler are swayed by these, and oftentimes they are not merely deterred from wrong doing, but prevented and obstructed in the honest and enlightened discharge of their duty by the clamours of ignorant or of interested parties.

The two opposite effects of this influence may be illustrated by taking the instances of its most legitimate and most improper application.

When the opinions of enlightened men, freely promulgated, are diffused and find general favour with the community; when the errors of a political system are fearlessly exposed; when the impatience of the people, under abuses of long standing, and powerfully supported, breaks out in complaints against the ruling powers,—a real service is rendered to the public welfare; and no charge can be brought against the people of resuming their delegated trust, or begrudging their deputies the authority with which they have been clothed. Indeed, those deputies ought to feel contented that the cause of truth and good government is thus promoted, and the general interest consulted.

They are not controlled or interfered with, but find their views rather furthered than impeded.

When the virulence of personal attack deters a representative from pursuing the course which his honest and deliberate judgment dictates; when dread of incurring printed censure deters him from doing what his duty, according to his own conception of it, requires; when to gain the applause of such as regulate the Press, or to disarm their hostility, he shapes his conduct according to their wishes,—then he shamefully betrays his trust: those who thus beleaguer nim, and he who suffers himself to be swayed by his fears, or by his love of praise, equally commit an offence of a very grave kind in the eyes of all rational men.

We have hitherto been regarding the Press as either an organ of public opinion, directly moved or inspired by the people, or at least as an indication and exponent of it, coinciding with the people's views, and adopted, if not authorized, by the people. It is certain that in a good degree this is likely to be the case. In the long run the Press, if the people be not split into parties, will be pretty sure to coincide with their opinions and feelings; and where there prevail party divisions, each portion of the community will sooner or later influence some portion of the Press. But it is also quite certain that there is here, as in other processes both of the moral and physical world, action and reaction. If the public sentiments act upon the Press, so does the Press upon those sentiments; and this occasions mischief of a very grievous kind to the people themselves, and to popular government. It is one of the worst evils of that form of polity, that it gives the greatest scope to this abuse; an abuse of so pernicious a kind that nothing can reconcile a reflecting mind to it but the persuasion of its being an almost inevitable consequence of free discussion, and thus regarding it as the heavy price which must be paid for this inestimable blessing.

It is in two ways that the Press thus produces its mischief. Private individuals, armed with no commission from any quarter, much less invested with authority from any power in the State, and bearing no certificate of any qualification to recommend them, assume the direction of periodical works, and do not give their names to the public. Their capacity for the task which they have undertaken is of course to be judged by the manner in which they perform it; about that there can be no difficulty or doubt. But their trustworthiness, either as relaters of facts or as guides of opinion, is a wholly different matter, and of that, the most material portion of the character which they ought to have, they furnish no vouchers whatever. They may be the most false and deceitful of human kind; they may be the most spiteful and malignant; they may be men whose names, if made known, would deprive every assertion they advanced of every claim to credit, and strip all they wrote and published of all chance of being believed or even listened to. They may have sinister and sordid views in putting forth their statements; then they may have a personal ground of quarrel with individuals, or with parties in the State or the Church; and thus be the very last persons in the whole world whom any one would believe if the mask under which they lurk to assail their adversaries was torn away. Their narratives may be dictated by mercantile or by money speculations; and the persons who, ignorant of the source whence these stories proceed, rush to some market to invest their capital, would be loath to risk a shilling of it on the faith of their statement, did they know the purpose for which it was put forth. They may be rival authors as well as rival tradesmen, and may have published some translation of the same work, and thus have a direct interest in running down the succeeding translation;* but they speak in the plural number, and the

* This is not an imaginary case; it has repeatedly occurred.

reader is utterly deceived, and supposes he is hearing the sentence of a just and impartial judge, when, in fact, the opposite party has, unknown to him, crawled upon the bench, and, personating the judge, delivers in a feigned voice sentence in his own favour.—Again, their views may be pernicious to the State. They may be men reckless and abandoned, desirous of change for the confusion it produces, anxious to see the most desperate courses taken for the sake of that mischief, the risk of which would make all virtuous men dread even the most prudent and cautious innovations. They may be concealed partakers of abuse, creatures engendered in corruption, and sustained in their noxious existence by the filth that first warmed them into life; their names, if disclosed, would make the defence which they undertake of oppression and misgovernment, their resistance to the people's rights and the people's improvement, only further those sacred interests; but they defend the misrule on which they fatten, and assail those who would reform it with the appearance of pronouncing an impartial award upon a public question foreign to their own interests.

It is endless to go through more particulars. Whoever has lived long in political society, but more especially they who have lived in courts of law, must full surely know that by such means as these are the people supplied with narratives of fact and statements of doctrine. The practice of deception becomes nearly universal. The readers are betrayed into a confidence which they never would bestow were they aware of the authority upon which what they read is grounded, and the views with which it is prepared and promulgated.

If such is the constitution, generally speaking, of the Periodical Press in all free countries, wherever party prevails this engine becomes a very easy acquisition to any faction; and it is worked with additional vigour and increased effect. This, however, greatly lessens the evil; for as it is well known to which

party each publication belongs, something like a rent is made in the veil which conceals the real authors; or at least, the names of their respective patrons and employers being given, the public are warned against believing what is said against their adversaries. It is still true, however, that the followers of each party are made to believe whatever their unknown agents may please to promulgate; and also that numberless things are published by them from their lurking places, which the respectable leaders of the several parties would be extremely loath to give in their own person.*

The consequence of this abuse of the Press is twofold. There is often given to public opinion a wrong bias, which lasts long enough to create delay in the adoption of important measures, or even to produce a permanent effect upon the mind of the people. There is still more frequently an obstacle interposed to the discharge of the public duty of ministers or representatives, by the clamour excited among the constituents of the latter, and among those classes to whom the former look for support. The measures and the men have neither of them fair play. If the people really, upon due consideration, adopted the views inculcated upon them, no one could complain of the result; it is one of the consequences of a free or popular government. But what we have a good right to complain of, is the effect produced by a very few persons who, to serve their own or their patrons' purposes, mislead the people, deceiving them by groundless statements into

* By far the worst instances of these great abuses are to be found in America, where, nevertheless, some of the editors give their names unblushingly to that society which they daily outrage by their detestable publications. Such excess of effrontery could never be tolerated in this country, where, however, persons pretty generally known almost as much as if their papers bore their names, are found to drive a most scandalous traffic in slander, sometimes to gratify political parties by whom they are paid, sometimes still more wickedly to extort money by means of threats. Lord Denman obtained a most valuable enactment to check this abominable practice.

erroneous opinions, or inflaming them by well-contrived violence into unruly feelings.

There was no abuse in the Athenian government more grievously felt than the power of the profligate men whose practised eloquence "wielded at will that fierce democratie." Their arts, and their shameless want of principle, are well known, and we shall, in a subsequent part of this work, have occasion to contemplate some of the mischiefs which they did. Among us there are very different talents, no doubt, brought to the same work of swaying the people. But though of an inferior order, those talents are perfectly well suited to the work they are set to do; and, accordingly, the Press has with us succeeded to the influence of the orators at Athens, only that the latter came manfully forward in their own persons, and encountered the scorn or the execration of mankind when they were found to have been malignant or treacherous guides.

There is one remedy for all this; but to those who regard the uses of the Press as very important, and chiefly lament its abuse for their sake, it is a melancholy one to contemplate. The evil tends by its excess to work its own cure. It is said that in America no effect is produced by the assaults on private character, or even on the estimation in which public men are held, from the overdone abuse of the Press. Every one must be aware how inconsiderable, even in this country, where the Press is far more pure, its influence on private character has become of late years, in consequence of the greater prevalence of slander and violence in its productions. Thus a kind of remedy is provided by the excess of the evil.

It has often been questioned whether a restraint should not be imposed upon the Press, with a view to check those abuses by which it at once works mischief to the community, and lowers its own value for good purposes. The more closely this important question

has been considered the more plainly has it appeared that any such interference would be dangerous in the extreme. Beside the certainty that it would, if effectual, increase the power of the Press to an inconvenient degree, it would tend to impede the progress of knowledge and to fetter the freedom of discussion. There would be no possibility of devising any mode of restraint which should not place an undue control in the hands of the government. The conductors of the Press, labouring under the imperfections of the libel law, have occasionally desired that they should have a censorship placed over them, in order to be secured from the risk of prosecution under a law which is vague and uncertain, and ever liable to be abused. But little did they reflect that, a previous license being required, it must at once destroy their independence, and thus not merely obstruct their usefulness, but undermine their whole character, influence, and means of supporting themselves. An amendment of the law of libel, which shall at once protect authors and publishers from oppressive and vexatious prosecutions, and protect individuals from the slanders of concealed enemies, giving a due check to the dissemination of seditious, obscene, and blasphemous matter, is the only remedy which can safely be adopted for the mischief.

The people, again, can only be released from the control now exercised over them, by the progress of knowledge, and the efforts of courageous and enlightened men to stand the brunt of anonymous attacks, while they inculcate sound opinions, exhorting their countrymen above all things to think for themselves, and suffer no unknown writer to dupe and to betray them. Lord Melbourne, when at the head of the liberal party and of the government some years ago, earned the gratitude of his country by the honest declaration which he made in the House of Lords (doubtless with some rhetorical exaggeration),

that it remained to be seen how long the people would endure a Press which made it a general rule of its conduct never to tell any truth, and always to deal wholesale in falsehood. But the people must open their eyes to the errors and the vices of their false guides. They may be well persuaded of these, acknowledging them as often as the subject is broached; they may be disgusted with the reckless statements which are palmed upon them; they may feel alternately indignant and contemptuous at the solemn importance of anonymous sentences condemning or absolving, and the presumption of the dictation issued to the community and the government by the most obscure individuals, only grounding their importance upon the fact of their being unknown. But this is not enough; the people must cease to let anonymous statements influence them, merely because it is repeated seven times a-week: they must learn to suppose that a thing being printed does not make it true; they must give over running after slander and scurrility as the only interesting composition; they must regard subjects and measures as of more importance than persons; and they must read for the sake of instruction, not for the momentary satisfaction of having their merriment excited or their spleen gratified. When the diffusion of useful knowledge shall have so far improved the habits of the people, then no such evils will result from the Press as we have been contemplating. It will be the source of great and unmixed benefits to the government and to the people; duly checking the one, usefully enlightening the other; saving both from the errors alike of rashness and of sloth.

Section II.—*Public Meetings.*

Much of what has been said in the last section is applicable to the subject of this. The people's right

of Meeting in large bodies is unquestionable in every free country. The deliverance of petitions to the government and to the legislative assemblies; the sending instructions to their representatives; the complaining of grievances which may have escaped the attention of those representatives; the keeping a watch over them in order to prevent any neglect of their duty or betraying of their trust; all these things require the people occasionally to assemble, and all of them are consistent with the delegation of the people's power. But these rights must be soberly and moderately exercised. If the people threaten their representatives or the executive magistrates; if they dictate their line of conduct in any given case; much more if they, chiefly by their numbers or the overawing appearance of physical force, or by the frequency and regularity of their Meetings, show an intention of usurping the functions of their deputies; then they resume the delegated trust, and the representative principle is wholly violated.

Nothing can be more certain than that the worst excesses of the French Revolution were occasioned by the interference of the people with the proceedings of the Legislative Assembly first, and afterwards of the National Convention. Hardly a day passed without some popular commotion; and it was the ordinary spectacle in the Legislative Body to see mobs enter the Hall, and demand the adoption of certain favourite measures. It was, I remember, usual to say in those days that the whole of the mischief arose from suffering the galleries to interfere with their plaudits or their hisses, and from admitting strangers into the body of the Assembly when they came to petition or to remonstrate. These were, assuredly, great evils, and productive of further mischief; but they were only fruits of the same bad plant which would have shed destruction over the infant republic had the galleries been as silent and

submissive as our own, and the doors been closed like ours against all intrusion. The people, or at least a portion of the people, both in Paris and in the great provincial towns, had only partially given over their power to the Assembly and the Convention. They were still far too much excited by the transactions of the day to bear in silence their exclusion from the active exercise of their power, to sit quietly by while their representatives performed the whole functions of the government. They accordingly were distributed in societies and in clubs; they had daily, or rather nightly, meetings to discuss the proceedings taken by their deputies during the morning; they arrogated to themselves the right of approving or rejecting all that was done by the constituted authorities; and they knew their own power, from the physical force in their hands, well enough to rest satisfied with nothing short of an admission to a direct control over those authorities. The numbers of the clubs themselves, and their immediate retainers, were sufficient to have operated upon the government; but they had a direct communication at Paris, through the municipality, and in some of the other great towns, less regularly, but almost as effectually, with the rabble of the streets—men fit for any desperate enterprise, and seeking to gain by the confusion which to all the good and the wise presents the aspect of the worst political ills. It was, in truth, the control of the government in the hands, not so much of the people, as of the mob; and, accordingly, the party chiefs used that mob more effectually for their own factious and selfish purposes than their influence in the legislature itself. This is no doubt an extreme case; it was during a revolutionary crisis; and had anything of the same kind been continued after the tempest passed away, there would have been established an anomalous and mongrel government, which in no respect deserved the name of representa-

tive. The excess of the evil worked its own cure. The Reign of Terror strengthened whatever constitution succeeded that of the year 1793; and the horror of mob violence continued not only throughout the Directorial government to prevent all direct interference whatever of the people, but was the main prop and stay, first of the Consular, and then of the Imperial regimen, in both of which the people were deprived of all influence, direct or indirect.

In this country we have been at different times visited with the abuse of Public Meetings. In the year 1795 they were prohibited by statute, and, as it appears to me, without a sufficient warrant from the extent which the mischief had reached. The consequence of this was unfortunate for the government of that day. It is very possible that the right of meeting might have been so far abused in the course of a few months as to justify in all men's eyes the strong measures adopted by the legislature. It is quite certain that few could perceive the strength of the case upon which those measures were grounded, although they were easily carried by the strength of the government.

In 1819 the case was materially different. Immense multitudes had been accustomed to congregate; and there was reason to apprehend the effects that might result from such displays of physical force. Many friends of popular rights were convinced that some check had become necessary, some regulation at least of such assemblages; and, among others, I well remember my friend Lord Hutchinson, when I complained of the Six Acts, saying that he thought the Whig party should be thankful they were out of office, and that the odium of passing some such measure was thrown off their shoulders upon those of their adversaries; "For depend upon it," he said, "the right of meeting at all is in jeopardy from such assemblages—so numerous and so crowded." My opinion, however,

that these repressive laws were not required, is strongly confirmed by the circumstances that a general election occurred within four months of their being passed, and this falling within the exception in the provisoes, public meetings were everywhere held, with all the excitement of such an occasion, and without any breach of the peace.

The late proceedings in Ireland belong to another class. They are, without any doubt, inconsistent with even the semblance of a regular, above all a representative, government. Meetings of 30,000 and 40,000 persons held all over the country, and so frequently held that they seemed to be one body constantly adjourning and re-assembling, are wholly subversive of the legislature's and the government's authority. Their being peaceable in their demeanour, chiefly from the strict discipline which their leaders, lay and clerical, exercised, rather increases than lessens the risk attending such proceedings. The danger of violent outrage, the alarm excited among peaceful men, the intimidation by which some are forced to attend, others deterred from counter proceedings, are of themselves sufficient to prove their illegality. But their manifest tendency to overawe the government and the parliament is sufficient to demonstrate the necessity of suppressing them at all hazards. If they had been permitted to go on training the whole people, and so far disciplining them that only one step, that of arming with pikes, would have been wanting to convert half-a-million of men into a rebellious army, the highest public duty of the government would have been betrayed. But if even the system had been suffered of immense Meetings held twice a-week on one subject, and showing great physical force, though never used to break the peace, there can be no doubt whatever that the government of this country would have ceased, as far as Ireland was concerned, to reside in King, Lords, and Commons.—It would have been transferred to other, and to the worst hands.

It is never to be lost sight of that such Meetings as we have been speaking of, and indeed all popular assemblies, are convoked, not for deliberation or for discussion, but for very different purposes. They are attended by men all of one opinion; all engaged heart and soul in the pursuit of one object. They meet to excite and influence each other; to give vent to feelings which they have long entertained and cherished, or declare opinions which they, or some person for them, have already formed. They bear no contradiction; they listen to no reason. They are bodies of men assembled for action, not for consultation; their real objects are to prepare for some violent act, and to impress the Government with fear.—A government which can suffer them, no longer deserves its name, for it has abdicated its functions.

Upon the whole we may rest assured that the right of Public Meetings must, to be safe for the State and consistent with a representative government, be either temperately exercised from the good sense of the people themselves, or it must be placed by the legislature under wholesome and wise restraints.

If not abused, there can be no doubt that the right of Meeting is of great value to the people. Some reasoners who have a prejudice against it, and the late Mr. Canning was at the head of them, have argued that the mixed constitution of this country did not recognize any numerous body acting, unless in a corporate capacity. They have held corporations of all kinds, whether formally and nominally such, or only quasi corporations, that is, persons of a certain specified description, persons of a "defined caste," as Mr. Canning called it, as well entitled to meet, and as doing no harm by their combined proceedings. All others they conceived to be excluded. I confess I think this a somewhat fantastic refinement. No one can see much definition in the thirty thousand freeholders who have a right to throng the sheriff's court

in the West Riding of Yorkshire; nor even any peculiar virtue in the assemblage of ten thousand persons in name and legal description, as well as in substance, corporators, the freemen of London. The genius of our constitution admits all men to much more important offices than attending public meetings, and admits them without any regard to class or caste. Did these reasoners never hear of a *tales de circumstantibus*—jurors chosen to make up the special jury pannel's deficiencies? These in practice are, it is true, generally taken from the common jury pannel; but by the letter of the ancient constitution they are to be chosen indiscriminately from the bystanders who happen to be in court at the time the cause comes on. Then, who were the original voters for members of parliament and for most corporate officers in boroughs? All the inhabitants, without qualification; that is, every person dwelling in the several boroughs. We may rest assured, that this fanciful theory rests neither upon any reasonable ground, nor upon any learned view of our laws.

Section III.—*Judicial Functions.*

The most important department in every State is the administration of Justice. It is, indeed, for this inestimable benefit that society is chiefly formed; and it is the price for which men are induced to give up a portion of their natural liberty when they place themselves under the restraints of regular government. As it would not be too much to affirm, that even the worst judicial system, under the most absolute despotism, is better than the lawless state of barbarous life; so it is certainly true that the judicial portion of the most free and enlightened State is the great zone which embraces and binds together the entire political edifice, indissolubly connecting its upper and lower portions; mitigating the evils endured by the humbler from the

possessions and the power of the exalted classes; protecting the few from the oppressions of the many; cementing and consolidating the whole of the great social pyramid.

It is of great consequence to the people that they should have a share in so important a branch of the State. It is the nature of all democratic and of all mixed governments, both in ancient and in modern times, to confer this high privilege upon them. In Athens the judicial business was in their hands far too entirely; they were the members of the great tribunals (excepting the Areopagus), before which all questions of civil or of criminal justice came. This system led to the greatest evils; it occasioned the most cruel oppression of those who had lost the popular favour; the most shameful escapes of the criminals whom the people liked. The arguments, or rather the topics of declamation used by the advocates, both when addressing the courts and when writing for parties who were nominally to defend themselves, are such as plainly prove that the pursuit of the truth was the last thing thought of in such trials. In Rome the people acted as *judices* or jurors, to assist the magistrates, who were also appointed by popular election. This was a far less exceptionable course of proceeding than the Athenian; and much less injustice both to individuals and to the public was wrought by it. In modern times all free States have adopted trial by Jury, generally in both civil and criminal cases; always in criminal.

It is not easy to overrate the importance of this function to the State, or the benefits which the people derive from the exercise of it. Many questions are far better determined by one or more judges; points of law, of course, must always be left to them; but mere questions of fact, too, are oftentimes better entrusted to their investigation. Sometimes an arbitrator is the best judge; and when a long and complicated

investigation of facts, especially if these are in many parts mixed up with legal questions, is left to a single person of competent learning and experience, a far better trial is obtained than any judge or any Jury could afford. But in three classes of causes the use of Jury-trial is admirable, and all experience satisfies us of its virtue. *First*, where a question of conflicting evidence arises, nothing can be better than that several persons of different habits of mind and various capacities should discuss, sift, and decide it. *Secondly*, where an award of damages as a compensation for an injury received is to be made, the same diversity of the Jurors' minds and views gives the best security that a right amount will be fixed upon. *Thirdly*, when there is a party to be tried, or a right investigated, the government being the prosecutor, or some powerful person or corporation being the plaintiff, it is essential to liberty that judges named by the Crown, and always belonging to the same class with the powerful party, should not decide on the fate of the person or the cause; therefore the equals of the less powerful party are the only persons in whom this important office can be safely vested.

Such are the benefits of Jury-trial to the judicial system. To the people it is of a still further use. They are thus habituated to public business of the gravest and most important description. They become conversant in the laws by which their rights are defined, and their duties regulated. They learn the nature of the government under which they live, in its most essential branch. They act and observe under the superintendence and instruction of a virtuous, a learned, and an experienced functionary. Withdrawn from all the turmoil of the popular assembly, its violence, its rashness, its deafness to reason, its abnegation of fairness and candour, they bear a part in a solemn and important discussion which can only be conducted by rational measures and determined according to the

truth of the case alone. They are engaged in an inquiry where only truth is the object of pursuit, and all matters are disposed of on their real merits. The political education of the people is incalculably forwarded by this proceeding; their moral habits are much improved by it.

There is nothing more certain, too, that unlike the other powers reserved in the people's hands, their judicial office is performed, and all its precious benefits secured, without any risk of evils being incurred. No mischief can ever ensue from it, as the price paid for so great advantages. If it be said that errors are unavoidably committed by Jurors into which professional judges would not fall, the answer is, that in all well-constructed judicial systems, means are provided for correcting these, or for obviating their effects. If it be alleged that an obstinate Juror may, in defiance of the truth, and in disregard of his oath, suffer the guilty to escape, from party or from personal bias; it must, on the other hand, be borne in mind, that this is a small price to pay for the perfect security which a Jury affords to all men, even the humblest, against the ruin that power and its minions might bring upon them. As long as a jury must be appealed to by the most powerful parties in the State, in order to overwhelm an obnoxious individual, we may rest assured that there is little hazard of such a catastrophe destroying an innocent man. This is a real power, a solid influence, an efficacious check to misgovernment, placed in the hands of the people, and never likely to be abused.

We may now proceed to the history and structure of the Constitution, founded as it is upon the representative principle.

CHAPTER X.

THE STRUCTURE OF THE GOVERNMENT OF ENGLAND IN THE ANGLO-SAXON TIMES.

THE early history of every Constitution must of necessity be involved in great obscurity. Two causes contribute to keep us in ignorance and uncertainty respecting the origin, and even respecting the earliest stages in the progress of all political institutions.

In the *first* place, all Governments must have been established long before the period of written history, because men must have lived together in society, and even brought their civil polity to a considerable degree of maturity, before any writer devoted his labour to record their progress in the arts of government. The want of written annals is but ill supplied by tradition; for that can never mark the successive changes in the form of government, and must always confound together the dates of different events. Then the blank in authentic or accurate accounts is always supplied by a plentiful admixture of fables, feigned by the superstition or national vanity of the people, or invented by the mere exercise of imagination in the absence of true narrative. Hence the accounts which come down to the earliest historians are always a confused mass of facts and fictions, which they are little better able to digest and to purify than ourselves. Even the colonial establishments of both ancient and modern times form no exception to these positions, because the founders of them only carrying out with them a portion of the institutions already existing in the mother country, the true origin of the Colonial as

well as of the Metropolitan Government is in truth one and the same.

But, in the *second* place, the province of History itself, after men have begun to write it, presents anything rather than a satisfactory or trustworthy record of the successive events which have been the origin of the constitutions ultimately found established in different countries. It is only in recent times that Historians have taken any care to describe the political constitutions of the nations whose annals they undertake to preserve. In ancient times, with scarcely any exception, and in modern times, until within the last two centuries, Historians assumed that all the civil institutions of the countries to which they belonged were matter of universal notoriety to the age in which they lived, and, moreover; regarding such subjects as of inferior interest to their readers, they confined themselves to describing the great events of war, or the sudden revolutions effected by violence, leaving us in the dark respecting the most important parts of the civil polity established in each era and country. Hence, while the Greek and the Roman records contain a full detail of the battles, the sieges, the violent seditions, the massacres, which disfigure the early history of our species, and from which no period of its annals is exempt, we are left in doubt or in the dark as to many points of extreme interest respecting the institutions by which men's rights were protected, or their duties enforced, or the exigencies of the public service met; and are fain to glean our knowledge of these truly important matters from occasional notices in the speeches that have been preserved, or from the discussions of philosophers on Moral and Political questions —discussions which always assume things to be known that have never reached our times. Of this many instances occur in our examination of the ancient constitutions. But the same defect is perceptible to a great extent in modern histories. The preservation

of the laws made from time to time, no doubt affords important materials, as do the records of political changes that have happened. But many things exist in every form of government which the records of statutes fail to represent; and he would have a most imperfect knowledge of any constitution who should confine his study of it to the written law. It was only in the eighteenth century that the history of institutions, of manners and of customs, what may be termed the General History of Society, began to be written. The brilliant success of Voltaire in his truly philosophical work, and of Robertson in his general view of European history, has founded a new and invaluable school of Political science—which the great failure of others* has not been able to destroy. But whoever would learn the political annals of the nations composing the great European Commonwealth, will look in vain to their Histories for information upon many of the most important branches of the subject. The debates of the English Parliament, and the controversies among party men and speculative reasoners, which existed in the seventeenth century, throw much light on the unwritten law of the constitution at all times; while we have already found how difficult it was to ascertain the most important particulars connected with the successive changes in the structure of the French Monarchy, from the entire want of the one of these sources of information, and the scanty amount of the other.

The Constitution of England, unless in the circumstance of our Parliamentary debates having for the last two centuries drawn its original principles and early history into public discussion, affords no exception to the general rule. The early period in which our civil institutions were founded is involved in great

* Dr. Henry's bad execution of a similar plan applied to England is well known. Mr. Miller's is an excellent work, though in many parts speculative and even fanciful.

obscurity. The origin of these institutions, the shape which they at first assumed, the changes by which they were so moulded as to approach their ultimate condition, are all matters of doubt, and have given rise to controversies which there are no means of settling with any degree of satisfaction,—controversies through which the candid student of our political History, only anxious in the pursuit of truth, finds it impossible to trace his way, or to avoid being bewildered among conflicting assertions.

The first question that presents itself to the inquirer upon the early structure of the Constitution relates to the degree of freedom enjoyed by the People, and the extent of the power vested in the Sovereign. It is very natural for a nation which highly prizes its liberty, and values itself upon the superiority enjoyed till within the last half-century over all others, to plume itself also upon the length of time during which it has possessed so envied a distinction. A nation feels the same pride in this respect that a family does, and loves to trace back its nobility to a remote period of time, as individuals love to boast of the honours enjoyed by their remote ancestors. Hence, as might be expected, the English, and more especially that party among them which chiefly maintains popular rights, have fondly traced the origin of our free institutions to the most remote ages, and have easily lent themselves to the belief that there never was a period when a system of representative Government did not exist in the country. Under various names they consider a Parliament always to have formed a portion of the government, whether a Great Council or a Witenagemote, or a Michelgemote, or a Colloquium, or a Parliament.

In these theories there is some truth and some error. To hold that representation always existed, is manifestly absurd; it is a position borne out by no historical facts; it is even plainly contradicted by the

known facts recorded within the period of authentic History. We have already seen the clearest proofs of this in tracing the origin of representation; we have found that at the Conquest, and for nearly two centuries later, there were no representatives even of the counties; that the greater Barons or Peers sate in one Chamber with the lesser Barons or free tenants holding their lands, like the greater, directly or *in capite* of the Crown; that in the thirteenth century the counties began to send Knights as representatives of the lesser freeholders whose personal attendance was thus excused; that it was only towards the latter part of the century that the burgesses, or inhabitants of the towns, were represented; and that they, with the Knights representing counties, formed a body apart from the Peers, and had a chamber of their own.

It was therefore a most violent exaggeration into which Lord Camden* fell when he affirmed, with undoubting confidence, that at all times every portion of England was represented in Parliament, or, as he phrased it, that "at no period was there a single blade of grass within the realm unrepresented." The antiquaries—of whose lore he spoke with a contempt equally dogmatical, as subverting our liberties by their "fantastical speculations"—both come far nearer the plain matter of fact, and do those liberties much better service when they show representation to be an improvement of comparatively recent date, and prove that if before the thirteenth century the country was represented, it was only virtually, and not actually, inasmuch as the towns sent no one to Parliament at all, and of the county members those only sate in it who attended in their own proper persons,—none but tenants in chief of the Crown having any place in the great council of the nation.

But, if the reasoners who have held the higher language upon the antiquity of our Constitution, had

* *British Statesmen*, vol. iii.—Art. "Lord Camden."

only maintained that we have no record of any time in which the power of the Sovereign was absolute, they would have asserted a truth which cannot be contested. There is every reason to believe that, from the earliest period of our history, the Monarch's authority was of a limited extent. In this respect our history differs not at all from that of the other Monarchies which arose out of the Feudal system, or indeed rather formed a part of that system. Those who fixed limits to the royal authority were in England, as everywhere else, the greater Barons, with their dependents or vassals, and aided, no doubt, also by the concurrence of the lesser landowners in their schemes of ambition, of resistance to the Prince, and of war with each other. Here, up to this point, the history of the English Government presents no exception to that of the other feudal kingdoms.

But the next position which we have to lay down presents a distinguishing feature in the English Government; for it is a truth to which our Constitutional History bears testimony almost as irrefragable, that the legislative power, in other words, the supreme power in the State, was shared at all periods of time by the great landowners, the Barons, and that it was probably shared, in some degree, by the lesser Freeholders also. This latter position may admit of somewhat more doubt; the share of the greater Barons seems to be incontrovertible.

In the times of the ancient Britons, before the Roman conquest, the whole country was under petty Princes, who waged continual war with each other, but united their forces by common consent under Cassibelaunus, King of Kent, to oppose Julius Cæsar.* The Princes appear to have had less power over their subjects than those of Gaul. But of course anything like regular government was out of the question; only the leading men here, as among the Germans, exercised great

* *De Bel. Gal.*, v. 11.

influence as a Council of Officers under the Chief. The common people appear to have been almost in a state of slavery to the chiefs; but there can be no doubt that the same Councils which were held in Gaul and in Germany upon public affairs, attended by their chiefs, were also held in Britain.* The Provincial Government of the Romans, of course, was established here after their conquest. Three legions of 42,000 men were stationed in the country, and the governor or proconsul exercised arbitrary power over the inhabitants. There were, in the latter times of the empire, three of these officers: one termed *Dux Britanniæ;* another, *Comes Britanniæ;* and the third, *Comes Littoris Saxonici,* as opposed to the Saxon invasions during the third century. After suffering the greatest oppressions under the Roman Government, and also from the incursions of the Scots and Picts in the north, when the increasing weakness of the empire rendered it impossible to aid them against the Barbarians, the Britons called in the assistance of the Saxons, who, imitating the policy of the rider in the fable, when the horse asked his help, subdued them, and retained peaceable possession of the country until interrupted, some centuries later, by the inroads of the Danes. The first invitation of the Saxons and Angles took place in consequence of a general council held by Vortigern, the most powerful of the British Chiefs, in the year 449; and the conquest of the whole country was not completed till the end of the next century. Eight separate kingdoms were then established, but the union of two of these made the whole amount to seven, usually called, from thence, the Heptarchy.† This division of the country continued above two centuries; for although the seven kingdoms are commonly represented to have been united under Egbert in 827, it is certain that he only obtained a partial and uncertain dominion over the greater part

* *De Bel. Gal.*, vi. 20. † Sevenfold Government.

of five; that he never had any footing in the sixth, and that he and his son Ethelwolf never even took any other title than King of the West Saxons. Indeed, long before his time, in the sixth century, the more powerful Kings of Wessex, and afterwards those of Northumbria, used to take the title of *Breitwalda*, or governors of Britain—a distinction which only ceased in 670, on the death of Oswy. Oswy was the seventh Breitwalda, and Egbert called himself the eighth. Alfred, his grandson, was the first prince who was called King of England, and his grandson Athelstane first really ruled over the whole United Kingdom in 927, calling himself sometimes King of the English, sometimes of England. The Saxon Monarchy was not of long duration: the Danes, in 1016, entirely defeated and conquered that people; and after a restoration for a very short period of the Saxon line, the Norman Conquest, in 1066, finally overthrew it, establishing a foreign family upon the throne, and a foreign nobility in possession of the landed property of the whole country.

The Constitutions of the Saxons appear to have been the same in the several kingdoms of the Heptarchy, and afterwards in the United Kingdom. The descent of the Crown was irregular, because the ideas of men on hereditary succession were not matured; and when a prince left a son, more especially if that son was very young, a dispute frequently arose between his claims and those of his grandfather's second son, that is, the young prince's elder paternal uncle. The choice in such cases devolved upon the leading men—the chief landowners or thanes of the country; and even when there existed no dispute, the form of an election appears in all cases to have been observed, and the Sovereign is always said in the chronicles to have been chosen King (*electus in Regem*). At his coronation, a ceremony deemed essential to the perfection of his title, and performed by the chief prelate, the primate, he

was presented to the assembled people, who, however, never had any real voice in his election, but only by their acclamations gave an affirmative answer to the question put, asking if they approved, or took, or acknowledged him for their King. The power of the King never was absolute, nor anything approaching to it, but it was great, and his influence was greater. He had not only far larger possessions than any of the thanes or lords; his possessions were nearly equal to those of them all put together. Thus in the kingdom of Kent there were 430 places, or estates, and of these 194 belonged to the King. The rest were divided among two Prelates, as many Abbots, the Queen Dowager, and six Thanes, making in all eleven principal proprietors, beside whom there were smaller owners or sub-tenants, holding of the eleven thanes, as these held of the Crown.

In war the King commanded all the forces; he was the supreme judge, receiving appeals from all other judicatures, and sharing in all the fines paid upon conviction, according to the usual Saxon and, indeed, feudal practice of commuting all punishments whatever for fines. The great officers—the Earl, Eorlderman, or Governor of the county—the Gereefa, Sheriff, or Viscount under him—the Boroughreeves—the Judges—were all appointed by the King, and removable at his pleasure. I speak of the general state of the prerogative, although by the laws of the Confessor the Herctochs, or Dukes, and Sheriffs, are said to be chosen by the freeholders in the yearly folkmote. But in earlier times the Crown clearly had the appointment, and Alfred is recorded by Asser, a contemporary writer,* to have removed all the ignorant eorldermen, and replaced them with others. He could grant "his peace," that is, a protection from the pursuit of enemies, to any one, and demand money or service for it; and within four miles of his Court all

* § 35.

were secure. His first vassals did him homage by attending three times a-year on his Court, and he had a right to their services in war, with those of their sub-vassals or retainers, according to the immemorial Saxon and, indeed, feudal usage, which annexed military service to the tenure of all lands, the service of the tenant *in capite* being due to the King, that of the sub-tenant to his Thane, Hlafod, or Lord. But except arming his immediate retainers, the King had no standing army or regular guard. The Danish Princes introduced this practice, probably from the insecurity of their conquest, keeping on foot a guard called *Thingmann*, or *Thinglate*, of 3,000 men, selected from their whole forces, for whose government Canute compiled a code of rules. But this was an institution unknown to the Saxon polity, or even to the Norman, after the Conquest. With all these prerogatives and means of influence it is plain that the Sovereign's authority must have been very extensive.

The legislative power, however, appears never to have resided in the monarch. Great as his influence was, and likely to give him overwhelming power in passing laws, he nevertheless must resort to his council, or gemote, to make them. There is no trace of any period at which their share in passing laws did not belong to the *witan*, or wise men, or councillors of the king. These formed his council; they were never very numerous, seldom exceeding thirty, never sixty; and the laws were made in the joint names of them and the king. Thus we find Ina, King of Wessex, in 688, making seventy-nine laws at his witenagemote, "with the advice of his prelates, eorldermen, wisemen, and clergy." So Edgar, in 971, long after the union of the Heptarchy, speaks of the laws which had been made by him and his witan (Ll. Sax., 80), and this form, as well as the substance, was universally preserved. As for taxation, the royal revenues formed the main body of the public income, and the services

of the crown vassals superseded salary in the civil as well as pay in the military department. But direct taxes were occasionally levied, and frequently by the king without consent of the witenagemote; though certainly the most considerable of them, the Danegelt, originally raised in 991, to buy off with tribute the Danish invasion, was imposed by the witenagemote. It was continued, after many promises to repeal it, by successive sovereigns, until the reign of Henry II., when it was finally abolished. One source of revenue, however, appears in these times always to have been under the immediate power of the king; he levied duties of customs upon imported goods. His officers also raised contributions on the monasteries and rich proprietors, both the landowners in the country and the burghers in towns. As for the advantages which he reaped from the fines paid by his vassals on succession to or alienation of their fees, as well as from the marriage and wardship of minors, these were rather part of his landed property than of his revenues, and were equally enjoyed by the other lords of the soil. The regular revenue chiefly consisted of the royal property and of the direct taxes which the witenagemote raised. It must further be observed that, beside sharing the legislative power, the witenagemote also shared the executive functions of the government. By degrees they seem to have had a voice in the choice of governors and sheriffs of counties. All great acts of State were performed in their meetings. Treaties were signed by them as well as by the king; and the power of making both war and peace became vested in them jointly with the sovereign. Indeed, the necessity of having their concurrence when the king had no standing army, and could only rely on his own vassals for service in war, must at all times have made it highly expedient to act in concert with the great allodial proprietors, who owed him no military service other than they

might voluntarily undertake; and hence a reference of all questions of peace and war to their assembly appears to have become a necessary course of proceeding. Even in other countries, where the States had less regular power, they were convened on such occasions.

In France the sovereigns had in early times a means of maintaining their power and of reducing the assembly of their States to insignificance, which our sovereign never enjoyed. This power was curbed by that of the great feudatories, the six other princes, who formed, as it were, members of a great federal community; and accordingly the English sovereigns were more powerful in proportion to their great vassals than the French. But a very material difference existed in the relations in which these princes stood to their councils or states. The Imperfect Federal Union* in France produced its usual effects, and enabled the king to overpower any one province by the force which he derived from the rest. Hence, when the States of one rejected a law, or refused supplies, he had recourse to the others. So would it have been in England had the division of the Heptarchy continued, and the King of Wessex been only the most powerful of the seven princes. Happily for both our regular government and our legislative freedom, the whole were early moulded into one. The sovereign could not appeal from one to the others: he was forced to consult the general council; he was obliged to share with them his legislative functions; and their voice became a real and effectual control upon his power, instead of falling into a mere form, or little better, as in France, where the States were only assembled to aid the king with their information, or to prepare the way for their co-operation in his wars, or to hear him publish such ordinances as he was pleased to frame for the government of his dominions.

After the Norman Conquest the Royal authority

* For the kinds of Federal Union, see Appendix, No. 1.

was greatly increased, and came, notwithstanding the legislative power of the great Council, now called the Parliament, greatly to exceed that of the French Monarchs. Before the Conquest the most effectual check to it arose from the consolidation of landed property, of many great fiefs, in the hands of a very few great lords. As long as these fiefs were vested in a great number of Crown feudatories, there was no chance of their offering any resistance to the far superior resources of the sovereign. But in the tenth century three nobles, Godwin, Leofric, and Siward, had engrossed so large a portion of the country, with the fourteen or fifteen earldoms conferred upon them and their families, that they more than overmatched the King, whose principal security lay in fomenting divisions among them. The whole spirit of the Saxon institutions was indeed eminently aristocratic, like those of all the feudal Monarchies. Not only the privileges of the great men, the Thanes, were ample, but there was a regard had to rank and blood running through every arrangement of the State policy. The violation of an *ethel* born or noble woman was paid for by a higher *murde* than that of an *un-ethel* or common person. The murder of all persons was in like manner paid for by a *were* or *were-geld*, nicely adjusted to their relative rank. Nay, the testimony of persons was weighed in the same patrician balance, the oath of a tenant in chief, a king's thane, being of equal avail with that of six carles or peasants, and that of an eorlderman being equal to that of six thanes. A strange instance of this is preserved in the Saxon Chronicles. One Alfnoth sued the Abbey of Romsey for a piece of land; a jury of thirty-six thanes were about to decide the cause, and had retired, when Alfnoth, the demandant, challenged the tenants, the Monks, to prove their title by oath; the Eorlderman, patron of the Abbey, interposed, and the Court held his oath to be decisive, giving judgment for the

Monks, and condemning Alfnoth to forfeit his goods and chattels for his false suit.

It is clear that the Saxon Government was an Aristocratic Monarchy, a Feudal Aristocracy in the strictest sense of the word. The whole power in the State was shared between the Sovereign and the nobles, clerical and lay. The King had much opposition to encounter from their great possessions, from the numerous free followers over whom they exercised an absolute control, from the still more numerous hordes of serfs whom they possessed in property, and who were for the most part attached to the soil of which they were the only cultivators, from the warlike habits of these chiefs, and the habitual exercise of violence in which they lived, reduced into a system, and termed the right of private war. The superstitions of an ignorant people gave the priests an ascendant, which interposed another kind of check upon the Prince's authority; while the legislative functions of the State, what is, properly speaking, the supreme power, was shared by the King with the assembly of the Prelates and temporal Lords. With all these checks to his power it was still very great, from his ample possessions, his numerous vassals, and the divisions of those chiefs who were his natural adversaries. But to represent his prerogative as unlimited, and his government as despotic, would be a gross abuse of language; it would, indeed, argue an entire ignorance of the Anglo-Saxon story.

Yet he would not commit a much less considerable error who should represent, as some partizans of popular rights have done, this ancient constitution as Mixed in the modern sense of the term, and containing the democratic principle which grew up with it in a later age. Nothing can be more certain than that the people, the commons, had no share whatever, direct or indirect, in the government. Nothing can be more manifest than that there was neither actual nor virtual representation in its structure; and that neither the

lesser freeholders attended the Witenagemote in person, nor the burghers either personally or by deputy. They who have fondly imagined that they could trace in those remote times any semblance of the Constitution now established among us, have bewildered themselves in obscure paths, where the lack of light enabled their fancy to conceive things that had no real existence. They, therefore, in exerting all their ingenuity, whether to embody the creations of their imagination, or pervert historical facts to suit a particular theory, have, with the best intentions towards popular rights and free institutions, done a very unacceptable service to the cause they patronized. Whosoever founds his esteem of any constitution upon the remote antiquity of its origin, may depend upon it that he of necessity limits its approaches to perfection, and restricts within narrow bounds his own efforts for its improvement. Besides, the institutions of a rude age must needs be most imperfect, and little suited to the wants of a society advanced in civilization and refinement; and if those things alone are to be valued and maintained which have had their existence among barbarians, civilized men must of necessity abandon the precious results of political experience. Numberless were the evils entailed on the community by the feudal aristocracy which formed our more ancient Constitution. It may be fairly questioned if any society above the condition of men in the rude state, ever existed in a more wretched condition than that of England at the very period to which those reasoners, of whom I have just spoken, are so fond of bidding us look for the genuine principles of our free Constitution.

CHAPTER XI.

THE GOVERNMENT OF ENGLAND UNDER THE ANGLO-NORMAN MONARCHY.

THERE can be no doubt that William was enabled to consolidate and extend the Royal authority, from the period of his accession to the Crown. But much controversy has been raised upon the line of policy which he pursued, and even upon the course of his public conduct. While some have contended that he entirely changed the ancient policy of the realm, introduced the feudal system which had been established in Normandy, and fortified his authority by the extirpation of the ancient nobility and the transfer of all the landed property to his followers,—another class of reasoners have denied that he effected any change at all in the ancient Saxon institutions, and have strenuously contended that he obtained the Crown, not by his victory over Harold, but by the will of Edward the Confessor, arguing that *conqueror* means in fact only *conquestor*, a person who succeeds by devise, or by any other mode of purchase, as contradistinguished from one who takes by inheritance. Some indeed have been so inexcusably careless in their statements as to regard his title in the light of a devise, or at least of an appointment by the Confessor to him as one of the inheritable branches of the Saxon royal family;* and some, in answering them,

* Of this class is no less a feudal lawyer than Lord Coke. In his Commentary on the Statute of Merton (2d Inst.), he mentions the marriage of Robert, William's father, with Arlotta, his mother, after his birth, and conceives that though it made him legitimate by the custom of Normandy, and so inheritable to the duchy, it could not give him a

have fallen into an almost equal error by not adverting to the canons which regulate the descent of land.

Both these views of the subject must be regarded as exaggerated and erroneous. The record of *Domesday Book* clearly shows that many persons retained their property who had held it in the Confessor's time; and although, in consequence of the rebellion which took place during his absence in Normandy, the greatest changes took place in the distribution of landed property from the number of confiscations which ensued, there seems no sufficient ground for the charge brought against him of encouraging disaffection underhand, in order that he might have a pretext for making an universal transfer of landed property to the Normans. On the other hand, to deny that the military force which he introduced into the country, and the possession of his foreign dominions, enabled him to curb the Barons, and exert a much more vigorous rule than the English had hitherto known, would be shutting our eyes to the obvious facts of the

claim to the crown of England, because no legitimation *per subsequens matrimonium* is known to our law, the famous enactment at Merton (*Nolumus*, &c.), having of course been declaratory only. But even had William been born in lawful wedlock, he could not possibly have any claim; for his only connection with the Confessor was the marriage of Edward's father with William's great-aunt, the sister of Richard II., his grandfather; consequently he had no blood of the Saxon purchaser, and was a mere stranger, be he ever so legitimate. As well might our Queen claim the crown of Denmark, being the great-niece of Matilda, the Danish King's grandmother. It is a somewhat singular circumstance that the Judges, in delivering their opinions in the House of Lords, in the great case of Doe *v.* Vardell, in 1840, rested their argument mainly on this passage of the 2d Institute, which contains an error so gross as to throw great doubts on its authenticity, and, if authentic, to destroy the weight of the authority, beside every one of the three marginal references being erroneous. The Chancellor (Lord Cottenham) acceded to the opinion of the Judges avowedly on the score of Lord Coke's authority, conceiving it to be now for the first time cited, whereas it had been cited and rejected in the Court below, the King's Bench, from which the case came by writ of error. I have the satisfaction of knowing that the opposite view which I took of the whole question has met with the general concurrence of foreign jurists—in particular, Dr. Storey; see the last edition of his celebrated work on the Conflict of Laws.

case. The never-failing consequences of the Imperfect Federal Union were certain to flow, from the sceptre being in the hands of a prince who held on the Continent a Principality equal to one-third of the French Monarchy. For nearly three centuries* the English monarchs were endowed with these resources; and the event to which they owed their crown, a military conquest, with the constant presence of foreigners surrounding their persons, as well as the possession of so vast a proportion of the property of the country by those foreigners and their descendants, made the exercise of arbitrary power a far easier and safer thing than it had been under the native princes. Another change took place of great moment, and of extensive influence in augmenting the power of the sovereign. It is certainly most incorrect to represent the Conquest as having introduced the feudal policy; but it is certain that the Normans had established that scheme of government much more systematically and fully than any other people. Consequently, William never rested till he had moulded the less perfect Feudalism of the Anglo-Saxons after the Norman model. Allodial proprietors were tempted by offers of protection, and wearied out by vexatious proceedings, till they surrendered their independent titles and became, the more considerable sub-vassals or tenants in chief of the Crown, the less considerable becoming vassals of other great lords, who themselves held of the sovereign. The Conqueror derived from hence no little addition both to the splendour of his Court and the real power of his office; for all his vassals held by military service, and each when he took the field was attended by his own vassals or sub-vassals.

The vast possessions of the king and his family must have prodigiously strengthened his authority. William had 1,432 manors all over England; his brother Odo, Bishop of Bayeux, 450; Geoffrey, 280;

* Two hundred and ninety-two years.

Robert, Earl of Mortagne, 937—making in all no less than 3,099 manors belonging to the family, beside the sixty-eight royal forests, as well as many parks and free chases. Nor must we omit a most important change in the allegiance of the vassals introduced by the Conqueror, and calculated materially to curb the power of the Barons. Formerly the vassal swore to his baron fealty absolutely; he was even forced to follow him in rebellion against the Sovereign, and his oath of fealty to the Sovereign contained an exception of his duty to his liege lord. The Conqueror would not suffer any such limited or divided allegiance; he required all to owe him fealty without any exception; and he forfeited the lands of the sub-vassal as well as those of the vassal himself, if the tenant followed his liege lord in rebellion against the King, the universal overlord of the realm.

It has been said that Normandy was rather an apparent than a real increase of the English Sovereign's power; and of this opinion is Mr. Hume (*Hist.*, vol. i., App. 1). It cannot be denied that the Norman Barons, always aided by the French King in their attempts at throwing off the Duke's yoke, gave frequent occasion of annoyance to their prince, and often distracted his attention from the management of his English affairs. Yet no one can doubt that he derived considerable accession of power from so noble a principality; he often used his foreign troops directly in the subjugation of his English Barons; and it is certain that the first establishment of a constitution, nearly resembling our present system, was after that duchy and all the continental dominions had been severed from the English Crown.

But nothing certainly can justify those who have contended, on the other hand, that there were no limits whatever affixed to the power of the Sovereign after the Conquest. The Monarch was very powerful; he was not absolute; and this leads us to consider the only

but the material check to his power, beside the mere force of the wealthy Barons, at all times more or less a restraint upon the Prince in every feudal Monarchy—I mean, of course, the General Council, whose interposition was always held necessary for the making of laws.

This body had now changed its name, and was called by the Norman term of *Parliament*, in Latin *Colloquium*, instead of the Saxon Witenagemote or Michelgemote. In some sort, too, its composition had undergone a change; but rather in appearance than in reality. The sounder opinion seems to be, that before the Conquest its members were the Prelates and the great allodial proprietors, and that the vassals of the king did not form a part of it. This is certainly the subject of controversy; and they who deny the position have at least to urge in support of their opinion the great importance of the Crown vassals, the powerful tenants *in capite*, and the likelihood that the King, who alone had the power of summoning the Council, would call these his vassals to assist. But be this as it may, no doubt can exist that after William had, about the twentieth year of his reign, completed the feudalization of the whole kingdom, and converted all the allodial into feudal holdings, the Council was composed of the Bishops, Abbots, and great Barons, tenants in chief of the Crown, who were required to attend their Lords' Court or Parliament three times a-year, at the great festivals of Christmas, Easter, and Midsummer, as the Gemotes had been held before the Conquest at the same seasons. The numbers who attended the meetings were not great. The whole Barons of the realm were only, according to the most accurate enumeration, 605, of whom 140 were ecclesiastical; but a very large proportion, in consequence of their distant residence, never attended the court. The stated meetings were probably occupied chiefly with matters of form and routine, while the important concerns of the kingdom

were reserved for occasional meetings, which the Prince summoned when he found that he wanted their aid in his wars, or their assent in making laws and bringing great offenders to punishment.

It is chiefly from the interposition of these occasional assemblies, whenever matters of importance were to be transacted, that we learn the strength of the Parliament, and can estimate the degree in which the Royal Prerogative was limited by the established Constitution, subject to one remark which I shall find it necessary afterwards to subjoin. Let us mention a few of the principal occasions on which the very imperfect history of our early Constitution has preserved the memory of this parliamentary interference, and we shall be convinced that though the Conquest consolidated and extended the prerogative, it did not materially break in upon the functions and authority of the Great National Council.

When the Conqueror had nearly matured his plan for feudalizing the kingdom, he assembled a Parliament in London; and the country was divided into Knights' fees, the whole landowners, as well clerical as lay, being obliged to send for each fee, that is, each five hides, or 600 acres of land,* a Knight equipped for the field to serve during forty days.† This raised a body of 60,000 horse, there being 60,215 Knights' fees, whereof 20,015 were in the hands of the clergy.

One of the most certain occasions of calling a Parliament was the death of the King; when the old form of election was restored; and, indeed, as all of the Conqueror's successors, except Henry II., that is, William Rufus, Henry I., Stephen, Richard, and John, were usurpers upon the rightful heirs, the assent of the Council became a material confirmation of a bad

* This is about a fair average; but, of course, as the apportionment was by value, there must have been a great difference in the extent, according to the quality of the soil.

† Wilkins, *L. L. Sax.*, 227.

title. Thus William II. was chosen according to his father's dying request, Robert, his elder brother, being set aside. Stephen was crowned without any Parliament, but he convoked soon after a Synod of the Clergy, who assumed to dispose of the Crown. The Empress Maude had been acknowledged Henry's next successor at a Parliament held nine years before his death. On Henry II.'s decease the Queen convoked a Parliament to receive Richard I., and fix his coronation. At his death John held one at Southampton, which gave him the preference over his nephew Arthur, the rightful heir to the Crown.

It is manifest that little or no reliance can be placed upon such appeals to Parliament, as evincing the legal structure of the Constitution; because the power of the great Barons was such as made it necessary for the Sovereign who would succeed upon an infirm title, to conciliate as many of them as he could; and no better way presented itself of strengthening a defective claim to the Crown than obtaining the consent of a council composed of those Barons and the heads of the Church. There seems great reason for believing that this also was the main, if not the only, reason for assembling Parliament when any measure of policy or new law was to be sanctioned; and this is the remark subject to which I before stated the proposition, that appeals to Parliament were evidence of some power existing in the Constitution, independent of and even superior to the King's. It is possible that this was rather an expedient to which the King resorted, in consequence of the power and wealth vested in the Barons, than an acknowledged and fundamental principle of the Constitution. Nevertheless, the appeal to those assemblies on all important occasions, whether executive or legislative, is unquestionable.

When a prince was disposed to make any grant or concession to the people, it seems not to have been held necessary that a Parliament should be summoned.

This arose from the original principle of the Anglo-Saxon and Norman legislation. The law was held to be the King's decree; he made it generally on the petition of the Witan, or great lords and prelates; but he might also make it of his own free will, provided it was a concession to the nation, which might be presumed as of course to meet with their consent. The modern constitution retains this form, but extends it to all cases, as well those in which the prince yields something, as those in which he claims something. According to this view of the matter, Henry I. promulgated his famous Charter, renewing and confirming the old Saxon laws and those of the Confessor, of which we have no account, except that of Henry's confirmation. It is a very important statement in this charter, that all the alterations made by the Conqueror in Edward's laws, are distinctly stated to have been made with the consent of the barons as well as the prelates.

The treaty (1153) between Stephen and Henry II. was ratified in an assembly of Prelates and Barons, who witnessed the charter then granted by Stephen. Stephen held three other councils, in which he agreed to confirm all the rights granted by Henry I. to the nation.

The celebrated Constitutions of Clarendon, by which the clergy were subjected to the jurisdiction of the temporal courts, were made at a parliament attended by thirty-seven barons and eleven counts.*

In 1191 a Parliament was held against the usurpation of Longchamp, in Richard I.'s absence, and to appoint a council of regency. In 1205 a Parliament

* It is curious to observe the working of clerical prejudice in an accurate, and, generally speaking, a liberal mind. When Dr. Lingard (i., 386) is mentioning the most important of those provisions, that which makes a clergyman triable for a crime before a civil or temporal judge, he treats it as an innovation upon the rights of the clergy, overturning the old law, and only says of it, "however it might have been called for by the exigencies of the time." Can he really mean to affirm that it required any peculiar "exigency of the times" to render a priest amenable for theft, rape, or murder, like the rest of his fellow-subjects?

at Winchester ordered every tenth knight in the realm to be raised and mounted at the charge of the other nine, as a force to aid in recovering the continental dominions of the Crown, and required every man, on an enemy landing, to rise and serve on pain of perpetual slavery with a heavy poll-tax. This Parliament is said to have been attended by the Prelates, Barons, and "all the faithful people of the King," which last term means only, as we have frequently shown, that the assent of all not summoned was assumed. When, in 1213, John surrendered the kingdom into the hands of the Pope, and agreed to hold it as a fief, doing him homage as his liege lord, a council of the Barons and Prelates was held, and two Bishops, nine Earls, and three Barons signed the instrument. Nor were the Barons willing to forget this transaction, or indisposed to avail themselves of its disgraceful import when it suited their purpose. Soon after, they appealed to Pope Innocent, as their liege lord, against John, for whom, however, his Holiness not unnaturally decided.*

Although it seems to have been understood that all general laws must have the consent of the Parliament, it seems equally clear that the limits of the Royal authority in regard to taxation were very imperfectly defined, especially in the earlier period of the Anglo-Norman monarchy; yet it is not very easy to determine whether the Prince in his exactions was committing an usurpation or only acting according to his prerogative. The conqueror and his successors, beside their exactions from their vassals in the name of marriage, wardship, and the fines which they levied upon them on many other accounts, also levied tolls at fairs and markets, and on the passage of goods over bridges. No ancient charter granting a right of market with

* Dr. Lingard, though he does not defend this base transaction, is anxious to extenuate it by all the means in his power. Nor can anything be conceived much more flimsy than the topics he resorts to; for example, that the condition of vassalage was reckoned honourable in those times!

tolls, pickage, and stallage, ever purports to be by consent of Parliament. Customs were also levied on goods imported and exported at the havens of the realm. On towns, especially those in the demesne lands of the Crown, a tallage, in the nature of excise, was levied; and the inhabitants used to offer a composition, which occasionally was refused. The Conqueror, of his own authority, revived the payment of Danegelt, which the Confessor had remitted; and he is said to have raised by such means the incredible sum of nearly £11,000,000 of our money. One of the provisions of Henry I.'s charter was a restriction of the Crown's power of fining. Instead of the culprit being in the King's mercy, as had been the case under his father and brother, that prince restored the Saxon *were gelds*, which ascertained the amount of fine for each offence. He also provided that no new taxes should thenceforth be imposed; and he materially lessened the burden of the feudal incidents.

Yet notwithstanding this charter, the result of the infirmity of his title at the beginning of his reign, his extortions were fully equal to those of his predecessors; although from the Barons making no complaint it is probable that he confined himself to oppressing the inferior classes and the towns. He also kept bishops' sees vacant three and even five years, during which he received all their revenues; and sometimes he seized all a prelate's property at his decease. Canons being made against the marriage of the clergy, he sold at a high price licenses to break these. Desiring to raise a large sum, by fining the parochial clergy who had transgressed some canon, and finding this yield very little, he at once, and of his own authority, raised a general tax upon them, and called it a fine for breach of the canons. It is certain that, with great talents and address, he was one of the most unprincipled and tyrannical princes that ever sate upon the English throne.

The quarrels in which Henry II. was constantly engaged with the Church, probably restrained his violent and cunning nature so far as to prevent him from exciting general odium by interfering with the property of his subjects. But his successor, the favourite theme of praise with all our romance-mongers'* the gallant Cœur-de-Lion, was the most rapacious prince of his age. His shameless sale of Earldoms for money, and his restoring to the Scots their castles long in the hands of the Crown, for large ransoms to feed his extravagance, as well as his emancipating them from their fealty to the English Sovereign, are acts of as scandalous and as mean profligacy as any which his despicable successor ever committed. The regent, De Burgh, whom he left to scourge the country when he went abroad in 1194, is said to have raised in two years a sum equal to eleven millions of our money. The exactions of this functionary drove the citizens of London to resistance, and Fitzosbert's rebellion was the consequence. The Council of Regency in 1193, for Richard's ransom, levied a tax of 20*s.* on every knight's fee, and 25 per cent. on all income, ecclesiastical as well as lay. They appear to have had no Parliamentary authority for this; although they were named to the Regency by the Parliament held in 1191, as has been already stated. Following their example, John, in 1199, soon after his accession, levied a seventh of the income as well as the personality of his Barons, by way of penalty for their having deserted him in his disastrous Norman campaign. In short, with the exception of the Parliament held at Nottingham in 1194, of spiritual and temporal

* Whoever admires Sir Walter Scott's genius for romance-writing—as who must not?—naturally feels concerned for the failure of his Crusade tales to interest us in Richard. Nothing more unnatural, more upon stilts, more unbearable to read, than the speeches he puts into his hero's mouth, is anywhere to be found; hardly his manufacture of speeches for Elizabeth, and of light conversation for Buckingham and Charles I. about "Sweet Will" (*i. e.*, Shakspeare) and other matters.

Peers, we see hardly any example of a tax imposed by the National Council. That assembly imposed a tax upon land. The numbers which attended it, however, are a proof how little the principles of the constitution were understood, or the interference of the Parliament valued; only fifteen Peers of both kinds, lay and clerical, were present. It appears that in England, as in France, a semblance rather than the reality of general assent to taxes was alone required for their being imposed. The great difference between the two constitutions was that the general laws appear in England always to have been made in the National Assembly or Parliament; while in France the King and his Council did no more than promulgate their edicts to the General Assembly, making sure of its assent, if indeed that assent was ever asked, of which their remains nothing like evidence.

The power of the Crown in respect of the Church formed in these times a very important article of the constitution. In England, as in all other countries since the establishment of Christianity, the Bishops were originally the mere overseers of the clergy, and possessed of no temporal wealth or power under a religion of which poverty was the chief characteristic; and they were chosen partly by the clergy, and partly by their lay flock. But in proportion as their importance increased, the Church showed a desire to exclude the laity from interfering in the choice, making a decree in the Council of Constantinople, 869, against all lay votes at elections, and also against the Chapters receiving any royal nomination. At the same time the sovereigns evinced an equal disposition to interfere with their choice of prelates. Sometimes they accomplished, by main force, their purpose of directing the election; more frequently by influence. In Spain alone was the power of appointment vested directly in the sovereign, by a grant of Urban II., in 1088. In France, although the princes of the two

first races assumed the nomination, they afterwards yielded it, at least nominally, to the clergy. In England the right of the Chapters was not denied; but then the King claimed two important privileges; he insisted upon his license to elect being necessary before the Chapters could proceed, which gave him the previous power of recommending whom he pleased, and he then required the presentment of the prelate when chosen for his confirmation or acceptance, which gave him a veto on the election in the last stage. The monasteries in some cases claimed the right to the exclusion of the secular clergy, a claim admitted by even the stoutest advocates of the Romish Church to be wholly preposterous. The quarrel between John and the See of Rome began from the monks of Christ Church claiming to elect the Archbishop of Canterbury, and the Pope allowing this claim upon an appeal to him by all parties. The Anglo-Norman Kings may be said substantially to have directed the choice of all their prelates, though not to have directly named them. On particular occasions they made their appeal to the Great Council of the Barons, or Parliament, as when William the Conqueror appointed Lancfranc in 1070, by consent, it was said, of the Barons, probably because he was a foreigner, being a native of Pavia. The Barons appear occasionally to have interfered in this matter without being consulted; for we are told that they combined against Guitmond, to whom the King had offered an English see, which he refused on the ground that the King had no right to impose superiors on the clergy; and this answer was said to have been so distasteful to the Barons, that they drove him from Normandy after preventing him from being raised to the See of Rouen.

The only instance in which the Anglo-Norman Kings lost any of the Prerogatives which those of the Saxon times had possessed, was on the Earldoms becoming hereditary, as in Normandy, instead of

being, as formerly, conferred for life only. This difference was probably more in name than in substance; for the Earl's son must generally have been so much more powerful than the rest of the Barons in the district as to insure his nomination upon his father's decease. But, even were it otherwise, we may easily perceive that, with such influence over the clergy, with the direct power of appointing to all judicial and other executive offices, with their exorbitant landed property, and their numerous retainers, to say nothing of their privilege of interfering with the course of justice and thereby also with property, they must have possessed a power so extensive as to reduce the privileges of the subject within narrow limits.

There are two tests of the extent to which Royal prerogative is enjoyed in any community. The one is the power of making, or concurring in making, the laws by which the State is governed; the other is the power of ruling arbitrarily, so as to set at defiance any laws which may nominally exist for the government of the State. The former in theory may appear to occupy a larger space, because the legislative, in truth means the supreme, power in every country. But the force of the law itself, and consequently the value of the legislative authority, is truly tested by the latter circumstance, inasmuch as the silence of the law before the Monarch sets him above it; and if all his other attributes enable him to defy it, there is but little lost to him in having no power to change its provisions. Practically he may be absolute, though forming part of a constitution theoretically limited; not to mention that if the existing laws do not interpose obstacles to his tyranny, it signifies very little that he should be unable of his own mere authority to change them by new enactments.

If we apply these principles to the prerogative of the Anglo-Norman Crown, we shall find little reason for believing it to have been of a very limited nature,

The Princes who reigned from the Conquest to the granting of the Great Charter were, in the strictest sense of the word, tyrants; and Stephen, were he excepted from this description, owed his curbed authority to the constant rebellion of his Barons, and his disputed succession to the Crown, which filled his reign with anarchy, and covered the country with desolation. These Princes not only displayed the fiercer disposition of tyrants, with the caprice of their ungovernable humours, but they were constantly gratifying their arbitrary or cruel propensities at the expense of their subjects, and without exciting resistance or suffering restraint. The Conqueror, not content with possessing sixty-eight forests, with other old parks and rights of free chase for the amusement of hunting, to which, like all his race, he was passionately addicted, threw into a New Forest (the name it still bears) great part of the fine county of Hants, thirty miles square in extent. This operation was repeated in other districts by his sons and grandsons, and it implied the destruction of all the property within the district thus seized, the razing houses and cottages to the ground, the throwing lands out of tillage, the expulsion, and often the destruction, of the inhabitants. A promise to abstain from such waste was frequently made by these Princes when they had any point to gain, as to excite a spirit of hostility to the refractory Barons; and it was as often broken as made. At length the Charter of the Forest was extorted from John; its effect was to disafforest all that had been thus laid waste since Henry II.'s time, and it prevented the future spread of this intolerable mischief. These Princes often prohibited under severe penalties any person from hunting on his domains, or granted to one the exclusive right of chase over another's property,—a right not yet wholly extinguished in all parts of the island.*

* The maxim in William's time was—"Whoso shall slay hart or hind, men shall him blind."

But the worst of the Conqueror's crimes remains to be told, and the one which most strikingly proves under how little restraint the caprice and the cruelty of the Norman Princes were placed by the Constitution, how much soever they may have been occasionally thwarted by their Nobles, barbarians as cruel, as overbearing, and as lawless as themselves. He resolved to draw a zone of desolation—a desert country—between his dominions and the northern tribes, who had given him trouble by their incursions; and accordingly he dispersed over the northern counties bands of soldiery, with orders to burn, sack, and ravage the land, sparing neither man nor beast. The whole country between York and Durham was thus laid waste; upwards of 100,000 persons of all ages and both sexes, not enemies, but subjects, were slain; and a century afterwards the traces of this awful devastation were discernible on the whole of that road for above seventy miles. When we hear of Eastern Despots we must confess that they would be greatly slandered by any comparison of the Norman king's conduct with theirs. No instance is on record of any Oriental Prince ever thus treating the territory and the people subject to his dominion; their ravages are confined to hostile countries and inimical nations.

William Rufus passed his short reign in the unbridled gratification of his voluptuous passions and his cruel disposition; butchering prisoners with his own hand; laying waste districts to extend his parks; putting out the eyes of his captives when they were of rank—an Oriental cruelty, in which all the Anglo-Norman Kings indulged. It was his encomium on his rapacious minister, Ralph Flambard (the devouring torch), that to please a master he would brave the vengeance of all mankind; and his exactions were so intolerable, that the blow which deprived William of life was supposed to have been directed by private revenge.

Henry I., the scholar, as flattering historians have

named him, when alarmed by the resistance of his Barons, pursued a policy the most profligate and tyrannical ever known in modern times. He employed all the energies of the law and the services of corrupt judges to entrap and convict great landowners, whose forfeited estates on their attainder he bestowed on men of the basest extraction and most abandoned lives. Outlaws themselves for infamous offences, they thus became suddenly possessed of immense wealth, and formed a trusty body of allies against the old Barons of the realm. His dissimulation was proverbial; his violent temper bespoke him the son of William; his dungeons were crowded with victims; and, at his death, there was found his cousin, the Earl of Mortoil, who had long been in the dungeon, and had likewise been deprived of sight. Barrè, a troubadour poet and knight, prisoner of war, was ordered by him, in revenge of a satire he had written, to lose his eyes, notwithstanding the remonstrance of the Earl of Flanders, who was against a proceeding as cowardly as it was against the laws of chivalry and war. Henry persisted, and the unhappy victim dashed out his brains in a paroxysm of grief and indignation.

The passion of the chase was not merely shown by the Anglo-Norman Princes in laying the country waste to extend their forests; they established a code of forest laws, the most cruel and barbarous of any known among men pretending to the least degree of civilization. All within the forest precincts, and all who dwelt on the borders, were subject to this sanguinary code. It punished the slightest of the innumerable offences which it denounced against the game and the timber, with mutilation, loss of limb, and loss of sight. Henry II. had, at the commencement of his reign, when his crown was doubtful, substituted for these punishments the more merciful penalty of fine and imprisonment; but as his authority became better established he restored the old and savage inflictions.

His rapacity yielded to no Prince's since the Conquest; justice was openly bought and sold during his long reign, and instances are not wanting of his taking money from one party to accelerate the decision of a suit, after having been bribed to retard it by the other. That he was the best of William's successors may easily be admitted, without bestowing upon his memory any great praise; but when Hume represents his character as "almost without a blemish;" and adds, that it "extremely resembled that of his grandfather Henry I.," we are naturally led both to reflect on the sanguinary forest laws revived by the one Prince after he had yielded to the voice of nature in their repeal, and on the corrupt administration of justice, as well as on the barbarous cruelty of the other, in which he has not been surpassed by any sovereign who ever filled the English throne. As for Richard, Hume himself, with all the "childish love for kings" which Mr. Fox so justly imputes to him, has confessed that he was cruel, haughty, tyrannical and rapacious; and indeed his courage appears to have been his only redeeming quality.

I apprehend, therefore, that the exercise of such tyrannous acts as we thus find to have signalized the Anglo-Norman reigns, and without ever producing resistance from the subject, much less remonstrance from the Parliament, demonstrates the extent of the Royal authority and the feeble restraints imposed upon it by the constitution. Provided the King only called his Barons together upon great occasions, to confer with them touching measures of peace and war, or to obtain their assent to new laws, it would seem that he was at liberty to act as he pleased; that the administration of justice afforded no protection to the people; and that the privileges of the Parliament afforded no real check to the caprices, or the cruelty, or even the rapacity of the Prince.

It is quite certain that although in England there

was at all times a legislature, of which the King formed only one portion, and though the foundations were thus laid from the most remote antiquity, for the free government which was gradually raised upon them, yet as far as regards the actual power of the Sovereign it was fully as great to all practical purposes, and that the rights and liberties of the people were fully as contracted as in the neighbouring kingdoms of France and Germany. Indeed, the Baronial power, which formed the principal counterpoise in practice to the exercise of the Royal prerogative, was unquestionably more curbed and subdued in England than in the monarchies of the Continent. There can be no creation of national vanity more groundless than the notions which represent our ancestors as enjoying more freedom, and their princes as holding a more limited authority, than was known in the feudal monarchies of the neighbouring nations.

CHAPTER XII.

FOUNDATION OF THE PRESENT CONSTITUTION OF THE GOVERNMENT OF ENGLAND.

The history of our ancient Constitution, as far as we have now traced it, appears very fully to prove one material proposition respecting its structure. The mere existence of a legislative body independent of the Sovereign, though endowed with the right to share in the making of all laws, and though even admitted to the occasional privilege of being consulted upon extraordinary emergencies, whether of war or of finance, did not of itself secure the freedom of the country, or fix limits to the exercise of the Royal authority.

In order to attain these great objects of all free government, it is absolutely necessary, *first* of all, that the national assembly should be composed of persons entitled to sit in it of their own right, or by some other title than a Royal summons, which may be withheld at pleasure. But it is equally essential, in the *second* place, that it should be summoned regularly, or that the Royal authority should be so circumstanced, the Sovereign so situated, as to make his calling the members together a matter of necessity. *Thirdly*, even if they are secure of meeting, unless their assent be required to all measures of importance, and the Sovereign be held bound by the laws of the realm, no effectual check can be provided to his arbitrary power. *Lastly*, unless the members, of one at least of the assemblies, owe their seats in that assembly to the voice of the community at large, or are taken from the body of that community, and so have the same interest

with their fellows, the security of the public interests and liberties must be altogether imperfect. The Crown may be limited in its power; the Parliament may be clothed with important privileges; many of the greatest abuses may be prevented; considerable assurances of the general good being the guide of the government in its administration may be obtained; but nothing can prevent the machine from working with a bias towards the interests of particular classes in the community, those classes composing the assembly; because the deliberations of that body must lean towards the interests of those who form its members.

It is necessary to keep these fundamental principles constantly in view while considering the ancient structure of the English Government, else we shall surely be deceived by the mere name of a Parliament, and fancy that because there was always in England a National Council, there was always a free Constitution. There cannot be a greater mistake. When William laid waste Hampshire for a hunting ground, Yorkshire and Durham for a security to his conquests—when his successors each in his turn imitated his example as far as their pleasures were concerned—when they imprisoned in English or in Norman dungeons these grandees who had offended them, and put out their eyes like Persian or Egyptian Sultans—when they proclaimed the life of a man and of a stag of equal value, and mutilated the peasant who presumed to kill the deer or the hare that had trespassed on his cornfields—those tyrants, thus well earning the character given by the Chroniclers, "that while the rich moaned and the poor murmured, all must follow the King's will who would have either lands or goods,"—yet could none of them make any law without calling together a Parliament in order to obtain the assent of the Prelates and the Barons. No more clear proof surely needs be given of their thoughtless folly who, in the zeal of party or the overflowing of national vanity, scruple not

to affirm that the English have in all ages enjoyed a free, because a Parliamentary, Constitution.

The four great requisites of a real and effectual Parliamentary government—independent right of the members to sit, security for meeting regularly, necessity of being consulted, and general representation—were only obtained by our ancestors in the long course of ages, during which the Constitution became gradually more and more perfect. The foundations of the whole, however, were laid at a very early period, when the Barons came in conflict with the violence of the King, and when they found that the most effectual way of resisting his encroachments and securing their own rights, was not by making war upon him, but by securing the calling them to the national assembly, of which they formed the most important part as regarded influence in the country, although less important than the clergy in point of personal weight and authority. This first step was made in the reign of John, and others of almost equal importance were at the same time partially made.

The immediate cause of the quarrel between John and his Barons is extremely immaterial. From the beginning of his reign he had fallen into general contempt, by the feeble conduct which lost Normandy to the Crown; and the Barons resisted all his attempts to make them aid him in recovering it. For their disaffection he had rapaciously levied large sums, as we have seen (Chap. xi.), the seventh, it is said, of their personal property, under pretence of punishing their misconduct. The cruel murder of his nephew, Prince Arthur, impressed men's minds with the greatest abhorrence of him; and his general conduct was that of a profligate, a cowardly, and a bloodthirsty tyrant. An association of the Barons was formed, and they held a council at St. Alban's in 1214, under the Justiciary, when, without the King's concurrence, they republished the Charter of Henry I., and

threatened the King's officers with death if they in any way exceeded the bounds of their lawful authority. A second Council was soon after held by them at St. Paul's, in London, and an oath taken to stand by one another with their lives and fortunes until redress should be obtained. After fruitless attempts to divide their league, John was next summer compelled to yield their demands by granting both the general or Great Charter and that of the Forest, hardly of less practical importance than the former.

The Barons had found it necessary, in carrying on their long struggle against the tyrant, to take measures for conciliating the people and securing their support in case matters were pushed to the extremity of a civil war. Hence the same concessions which they demanded from the King to his vassals, they themselves made on their parts to their own; and the feudal oppressions were thus mitigated both to themselves, as tenants in chief of the Crown, and to their sub-tenants. The King and the other feudal lords were restricted in their demands of aid from their vassals, to the three cases of knighting his eldest son, marrying his eldest daughter, and ransoming his person if taken in war; all other aids must have the consent of Parliament. The King's ministers were deprived of all the jurisdiction by which they had previously levied fines for offences arbitrarily in order to fill the Royal coffers. His officers were no longer permitted to take provisions for his use on his progresses through the country, termed *purveyance*. Justice was declared to be no longer within the King's breast to deny, or delay, or sell it to the highest bidder, as Henry II. had so shamelessly done. Judges were henceforth to go the circuit all over the country at stated times. It was expressly provided that no free man should be imprisoned, or his goods seized, unless upon conviction by a jury of his peers, according to the law of the land.

But the most important provision in the Great Charter, as regards the form of the government, related to the summoning of Parliament. The clause which prohibited the raising of aids without the consent of a Council, required it to be composed of Archbishops, Bishops, Abbots, Earls, and greater Barons, all of whom were to be summoned individually by the King's writ; and of the other tenants *in capite* of the Crown, who were to be summoned in the mass by the sheriffs of counties. The notice of forty days was to be given by them, and the subject-matter of their deliberations was to be stated in the summons. It is remarkable that this important clause formed no part of the original demand of the Barons; and that it was omitted in the charter subsequently granted by Henry III. There seems reasonable ground for suspecting that the Barons little valued this provision; they were obliged to attend the King's court as a burden incident to their feudal tenure; and the principal object in the clause was to declare that those who neglected to attend should, if the Parliament were duly summoned, be bound, though absent, by the determinations of those who were present at any council. It must be further observed that this provision refers exclusively to one species of council, that which should be held for the granting of an aid or supply to the Crown. But, on the other hand, the insertion of the provision sufficiently proves the greater attention which was now paid to the subject of taxation. We have seen in the last Chapter how irregularly the power of levying money was exercised, and how seldom the Norman Princes resorted to Parliament for their extraordinary supplies. The loss of many landed possessions, especially during the civil wars of Stephen and Maude, and the loss by John of the Norman dominions, had now so far impoverished the Crown that recourse was more frequently had than formerly to the levying of extraordinary aids;

and hence the care taken to make this provision in the Charter.

It is a further and important proof of the progress which the towns and ports had made in wealth, that their privileges and liberties are guaranteed by a specific clause; so that the power hitherto exercised of levying tolls and customs upon the markets and upon imports, could no longer be lawfully used by the King.

The Forest Charter declared that all the land taken in to form parts of Royal forests, since John's accession, should be thrown open; and that twelve Knights should be chosen in each county court to inquire into forest abuses, and abolish all illegal customs which had been introduced, as well as to examine the conduct of the sheriffs and inferior officers of the Crown.

In order to secure the execution of the Great Charter, an extraordinary step was taken. Not only the Tower of London was delivered into the hands of the Barons for two months; but twenty-five of their number were chosen, without any limitation of time, as Conservators of the Privileges of the Realm, authorized, upon a complaint made, to admonish the King, and empowered, if redress were refused, to levy war against him. All persons were required to swear obedience to them, and, in fact, the executive power was entrusted to their hands. Nothing can more clearly show that the whole proceeding was of a revolutionary character; and, accordingly, John no sooner saw the Barons disperse than he collected his troops, ravaged the whole country, and finding no resistance from the League, would have entirely effaced all recollection of his submission at Runnimede, had not the Barons, unable to cope with him, called in Louis, the French King's son, and delivered over the crown to him, in the defence of which he was engaged when the death of John and the able administration

of the Regent Pembroke enabled the Barons to defeat him and to restore the independence of the kingdom.

The first step taken by the Regent, when preparing for this important operation, was to assemble a Great Council or Parliament, which was attended by all the Prelates and Abbots, some Barons, and many Knights. The Great Charter was renewed and confirmed with some omissions; among others that of the clause authorizing resistance, that respecting the summons to Parliament, and that respecting the forest abuses. But those provisions were expressly reserved for further consideration in a full assembly. Another confirmation of the Charter was given soon after. Many years later Henry called a Parliament to grant him an aid, which was at first refused, but afterwards given, on the ground of a threatened invasion from France. The assembly granted a fifteenth of personal property, but made the ratification of both the Charters an express condition of the grant. Notwithstanding the two former confirmations, little effect was given to the provisions of those Charters by the King's officers. They were since renewed no less than five-and-thirty times in the reign of the Plantagenet Kings down to Henry VI.; and always in the same form which they assumed in the 9th of Henry III. This Prince was ever in want of money, and he confirmed the two Charters in all six times; once or twice he was compelled to swear that he would observe them religiously.

The misfortunes which afterwards befel him are well known. In 1258 a Parliament called by him at Westminster was attended by the Barons, who assembled in armour; and, requiring redress of their grievances, compelled him to deliver over the greater part of the Royal prerogatives to a commission of lay and clerical peers, who should be named in a Parliament speedily to be holden at Oxford. This, which is known by the name of the "*Mad Parliament*," virtually deposed the King, vested the representation in twelve persons, and

appointed Parliaments to be held three times every year. The victory of Simon de Montford at the battle of Lincoln led to his usurping the royal authority; and, in 1264, he assembled such a Parliament as he considered would be favourable to his views. The writs of summons ran not only to Prelates, Abbots, and Barons, such being selected as were known to favour him; but four Knights were called, to be elected in the court of each county, and two deputies from each city and borough town. The lesser Barons and free tenants had in all probability for some time before been in the practice of sending two or four of their own number to attend the Council, and save the whole freeholders the trouble and expense of attendance; but it seems certain that this was the first occasion on which the towns sent representatives. I have entered so much at large into this controverted question in the Third Chapter, that there needs no further discussion of it here. But we may observe, that although the origin of our burgh representation seems thus to be fixed, we are altogether in the dark as to the mode in which the representatives were chosen. The freeholders chose their representatives at the county court; we know not how the townfolk chose theirs.

In the chapter just referred to I had occasion to trace the early history of the Parliament thus for the first time composed as it has ever since been. It appears that during the whole of Edward I.'s reign, till towards the latter end, though the cities and towns were summoned, yet their members did not attend regularly unless when the question of taxes upon those places arose. This seems to be the result of the best examination which I have been able to give the Statutes and the Writs. The towns which had the earliest writ of summons were those in all probability of the Royal demesne, they being in the nature of tenants in chief of the Crown. For the details of the question regarding the origin of the representation, and for the early

history and the peculiarities of the Scotch Parliament, the reader is referred to the Third Chapter, in which it appeared, for the reason there assigned, necessary to anticipate a portion of the subject, belonging naturally to the present discussion.

The most important step which was made in those times towards the establishment of a Parliamentary constitution, was the concession extorted from Edward I. towards the close of his reign. We have seen that the clause in King John's Great Charter, forbidding the Crown to levy any aid not granted by Parliament, was immediately afterwards struck out of the confirmations granted in Henry III.'s time; and greater oppressions than ever were practised in levying taxes upon the people. The revenues of the Crown from land were much diminished; the numbers of men liable to military service had also greatly decreased from the negligence of the mustering officers; and the turbulence of the feudal militia rendering the sovereign unwilling to employ them, he had recourse to hiring mercenaries, or bargaining with the Barons for paid forces. A great necessity for supplies was thus experienced by Edward in the course of the constant wars which he waged in Wales, in Scotland, and in France. To obtain these supplies he had frequent recourse to Parliament. In the first thirty-four years of his reign he had twelve times assembled that body for this purpose, and obtained twenty-one grants from the laity and five from the clergy. The former amounted in all to nearly the whole personal property in the kingdom; the latter did not fall much short of a whole year's income of the Church. Yet still his wants were pressing, and he had recourse to the most violent means for supplying them as often as the Parliament refused the aid which he required. He occasionally levied tallages, or a per centage, on all personal property, of his own authority. All his predecessors had maintained their right to do so. John

had sent itinerant justices round the counties for the purpose of swearing the bailiffs of all the landowners to the amount of their goods and rents. Henry III. had caused the same inquisition to be performed by four knights in each county, these commissioners being chosen by the justices. They swore each person to the amount of his own, and the personal property of his two next neighbours; and a jury of twelve men was to decide if the amount thus given in was disputed. Edward likewise sent out commissioners round the country to ascertain and levy the amount of tallage, as well that granted by Parliament as that which he imposed, more rarely, of his own authority; and the oppression and corruption of these officers was a cruel grievance to the people. But when he found a difficulty with the Parliament he did not confine himself to exacting tallage after the manner of his predecessors; his expeditions made other supplies necessary; and, fortunately for the liberties of the country, he had recourse to means which proved still more vexatious, till the evil worked its own cure. He raised, arbitrarily, the duties on exported wool, and forced the merchants to give him a loan equal to the whole value of the quantity shipped by them; and he more than once seized all their wool and hides, and sold them for his own use. He equally assailed the landowners, seizing their live stock, and issuing orders to the sheriffs to collect both provisions and grain for his army.

A spirit of resistance was excited by these violent encroachments unequalled even in the worst times of his predecessors; and the Barons, under Bohun and Bigod, so far intimidated the officers as to stop the purveyances which the King had ordered. Edward was alarmed by the proceedings of the two earls, made his peace with the clergy, gained over the citizens of London by a flattering speech, and sailed for the Continent. But he soon ordered a large levy to be made on the clergy, and thus united them with the people in support of the earls. The council appointed to

assist the Prince of Wales in the regency took the same course; and Edward was compelled most reluctantly to grant a solemn confirmation of the two Charters, with this important addition, that no aid or tallage should thenceforth be raised, unless by the assent of Parliament—that is, of the Prelates, Barons, Knights, and Burgesses of the realm; that no seizure of wool, hides, or other goods should be made by the Crown, nor any toll taken upon them; that all customs and penalties contrary to the Charter and to this additional article should be void; that the Charter so amended should be read twice a-year in all cathedrals; and that all persons acting against it should be excommunicated.

Edward endeavoured soon after to evade the force of the obligation thus solemnly contracted; and added a clause, saving all the Crown's rights. This, when proclaimed, excited so great a clamour in the city of London, that he again became alarmed, and gave his unqualified retraction of the clause. The year after, 1300, complaint being made in Parliament that the Charters remained unexecuted, he was obliged to grant an additional article, that the Charter should be read four times a-year in all the sheriffs' courts, and that three knights in each county should be chosen by the freeholders, with power from the King, to punish summarily all offences not otherwise provided for against the Charters. In the course of two or three years, however, he openly violated the new law thus made, levying tallage and poll-tax without resistance. He also appealed to the Pope to be absolved from the obligations which he had contracted; but though he obtained a Rescript declaring all his concessions void; yet, as with its artful statement of the grounds of the declaration, their having been contrary to the rights of the Crown, it added a clause securing to the subjects their ancient rights, he never ventured to use it; so that at his death, two years after, he left the famous statute prohibiting all

taxation without the consent of Parliament, as the established law of the land.

Although we should admit that the provisions in the Charter, thus confirmed for the tenth time, and the important additions made to it, were but imperfectly kept, that they were so often violated as to require constant renewals with repeated pledges, no less indeed than fifteen times in the next reign but one, it is nevertheless certain that a prodigious advantage was gained to Constitutional Government and popular rights by the nation having the text of a treaty to cite, the provisions of a law solemnly made in writing and universally known, to rely upon in their disputes with the Crown. The Prince who now levied money without the consent of Parliament, or who assembled a few dependent Barons and Burgesses instead of the whole Lords and Commons, acted avowedly and openly an illegal part, and plainly violated a known, established, and fundamental law of the land. It might depend upon the temper of his subjects at the moment, upon the force at his command, upon his success in courting and gaining one class of men to side with him against the rest, upon the courage and patriotism of the Parliamentary and popular leaders, above all, upon his own personal endowments, and his credit with the country for an able and successful administration of its affairs, whether he should be suffered to break the law with impunity,—whether he had to dread resistance to his oppressive acts; and consequently it would naturally depend on all these circumstances whether or not he should venture upon so unlawful a course. But there can be no doubt that he was sure to be often restrained in making the attempt, sometimes opposed when he made it, and occasionally punished when he ventured so far. The most important part of the new law of Edward was the renewal of the provisions originally inserted nearly a century before, and immediately afterwards left out, with the more precise recognition

of the power of Parliament, and the important addition of the County and Burgh representation. From this period we may truly say that the Constitution of Parliament, as now established, had its origin; and however that body may have occasionally had to struggle for its privileges, how often soever it may have submitted unworthily to oppression, how little soever it may have shown a determination to resist cruelty and injustice, and even a disposition to become the accomplice in such acts, we must allow that, generally speaking, it has, ever since the end of the thirteenth century, formed a substantive and effective part of the Constitution, and that the monarchy then assumed the mixed form which it now wears. The great outline was then drawn; the details, and shades, and tints have since been filled in.

The English nation ought piously to hold in veneration the memory of those gallant and virtuous men who thus laid the foundations of a Constitution to which we are so justly attached. The conduct of the Barons in John's reign is indeed above all praise, because it was marked by as much moderation and wisdom as firmness of purpose and contempt of personal danger. They had no sooner held their Council at St. Albans, and proclaimed the Charter of Henry I., than the tyrant, landing with his foreign troops, marched to lay their estates under military execution, and take signal vengeance on their persons. Cardinal Langton, the Primate, who, though forced on the kingdom by papal domination, had ever shown himself a true patriot, stayed his progress by his peremptory remonstrances, and by his threat of excommunicating all who should engage in such a warfare, while the legal course of bringing offenders to trial was open to the Crown. He afterwards encouraged the Barons, at the Council of St. Paul's, to insist on Henry's Charter, and excited them by his persuasive eloquence to take the famous oath, which he solemnly administered to

them, that they would die sooner than depart from this demand. He had already compelled John to promise the same Charter, then termed the Confessor's Laws, as the condition of reversing his excommunication. Once more, in the assembly of Bury St. Edmunds, he influenced them by his eloquence, and they took their oath at the altar, to make endless war on the King until he granted their demands. Nay, when John, in order to gain over the clergy as a last expedient, granted them a charter, abandoning all right of interfering with the choice of Bishops, and declaring that their election, though not confirmed by him, should still be valid, promising, moreover, to lead an army to Palestine, and taking the cross himself as a pledge of his pious resolution, the Primate was so little to be moved from his principles, or duped by such tricks, that he adhered to the party of the Barons throughout, only so far gained by the King as to make himself the bearer of propositions for their consideration; and, when the Pope had commanded him to yield, he positively refused to excommunicate them, according to the papal threats, but threatened to excommunicate John's foreign troops unless they were instantly disbanded.*

But as the Pope's whole conduct in this important affair was wholly unjustifiable, and indeed despicable, and as his successor in Edward's time had no share in the resistance offered by the Barons, the Romish advocates are fain to claim for their Church a share,

* I feel assured that this is the correct view of Langton's conduct, notwithstanding the suspicion that may be supposed to rest on it from his having been employed by John after his Charter of the 15th July in favour of the Church. It is certainly true that the Primate was tendered with the Bishop of Ely and Earl of Pembroke as his security to the Barons for his promise in January to give them an answer at Easter to their demands. He was also joined in the mission to the Earls of Pembroke and Warenne in April. But his refusal to excommunicate them, his threats of excommunicating the Foreign troops, and the Pope's letter in March, insinuating that he fomented the dispute, seem decisive in his favour; not to mention that his suspension from his see by John continued to the end of that tyrant's reign.

not only in the proceedings which extorted the Great Charter from John, but also in those which rendered it effectual to its purpose under Edward. Accordingly, Dr. Lingard, while he places Langton on a level with the Barons of Runnimede, pronounces Archbishop Winchelsey the author, with the two earls, Norfolk and Hereford, of the great change in 1297. Nothing can be more absurd. He wholly overlooks Langton's great praise, of having alike opposed the encroachments of Rome and of the domestic tyrant, of having faced the indignation of the Vatican, refused to execute its menaces, and used its thunder against John and his foreign mercenaries—of having shown so noble a disregard of his order and its interests, that the bribe of the January charter fell as powerless before him as the threats both of Innocent and his vassal. Winchelsey, on the contrary, was ever in league with Boniface VIII., obtained from him the bull against lay encroachments, took up his position in defence of the Church revenues behind that bulwark, was melted by Edward's speech and tears at Westminster, as much as the mere mob, to whom the crafty Prince appealed against his Barons, and was evidently disarmed by the order immediately after issued in imitation of John's early Charter, so utterly scorned by Langton, to protect the clergy in the enjoyment of all their possessions, and Edward immediately took him into favour, appointing him one of the young Prince's tutors and Council as Regent in his absence. His conduct in this office has been extolled. But to what did it amount? On the Barons refusing to attend the Council's summons to Parliament unless the gates of London were given up to their keeping, Winchelsey advised that this requisition should be complied with, clearly against his duty as the Regent's chief councillor. He appears throughout to have acted an interested part, prompted solely by a regard for the interests of his order; and

the whole merit of the great change which we have been contemplating belongs to the Barons, the merchants, and their leaders, Bohun of Hereford, and Bigod of Norfolk.* The clergy all behaved like their Primate. Edward's concessions won them over to his side, and they left the Barons and the people. On his sailing he, forgetting these concessions, ordered a heavy tallage to be levied upon their personal property; straightway they left him, and once more took part with the country.

While Edward has justly obtained the highest praise from lawyers for the great improvements which he introduced into our jurisprudence, we may remark that the two great changes which he made in the law, were pointed in directions not merely different, but diametrically opposite. The power of the Barons and of all landed proprietors was exceedingly increased by the famous statute *de Donis*, which allowed them to entail their real property, and thus to sustain the landed aristocracy. But the restraints upon alienations to the Church by the laws of mortmain, tended exceedingly to restrain the power of the spiritual Barons, though they might also give some additional protection to the lay aristocracy.

The conquests of Edward had no sensible tendency to increase the power of the Crown. Scotland was a source of expense and of weakness. Wales was still a greater diversion to his forces, without producing the least return either in men or money. On the Continent he was generally unsuccessful, and he found the expense and defence of his dominions there fully equal to any benefit they ever yielded him.

* The answer of the latter to Edward, when ordered to follow him abroad as commander-in-chief, is well known. "By the Eternal God, Sir Earl, you either go or hang."—"By the Eternal God, Sir King, I neither go nor hang." The Primate and his Clergy were contented with a lower tone. They begged the Commissioners sent by the King to represent that they had a spiritual head as well as a temporal, and must first have his leave to pay their money—adding, "We dare not speak to the King ourselves."

CHAPTER XIII.

THE GOVERNMENT OF ENGLAND UNDER THE PLANTAGENETS.

The more regular establishment of the Parliament, and the more full recognition of its privileges, was plainly to be seen in the events of the next reign. Edward, on his death-bed, had extorted a promise from his son that he would never allow his unpopular favourite, Piers Gaveston, to return from banishment without the Parliament's leave. That body made the favourite's return without their assent the ground of hostile proceedings against him, and his perpetual exile was made one of the conditions annexed to their first grant of a subsidy to Edward II. The annexing as a condition the redress of public grievances was now the course taken by them as a natural consequence of their acknowledged power to give or to withhold supplies. But a short time, however, elapsed before all regular and constitutional government was at an end, the Barons having, by an armed demonstration, compelled the King to allow the appointment of a Commission, called the *Ordinances*, consisting of Prelates and Barons empowered to prepare new Ordinances for the redress of grievances. Their proceedings, agreed to by the King in Parliament, nearly resembled those of the Mad Parliament in Henry III.'s reign; as their authority was plainly modelled upon that of the Committee of Barons then appointed. Some of their Ordinances were valuable improvements, especially that regulating the choice of sheriffs; abolishing all but the ancient purveyances, and repealing the new and oppressive taxes on wool and other merchandize.

One clearly resembled the Mad Parliament's law, that three parliaments should be held yearly. The Ordinances required "one to be held each year, or oftener if need be." Another also resembled the former precedent; for it transferred the whole functions of the Crown to the Parliament. The King was bound to obtain the consent of the Barons before he could either levy war or quit the realm; and the Regent, in his absence, was to be chosen by the Parliament, whose advice and consent was also made necessary to the appointment of all the great officers of State and governors of the foreign possessions of the Crown.

The other transactions of Edward II.'s reign are immaterial to our present purpose; but throughout the whole of it there prevailed the assumption that no matter of great importance could be transacted without the presence, interference, and sanction of Parliament. Nor is there any part of the Constitution practically of more importance than the recognition of this principle. The King's deposition was effected by a Parliament which the Queen and her paramour, Mortimer, summoned at Westminster, in the name of the King, by means of the Prince whom the Prelates and Barons in their interest had named guardian of the realm, or Regent. The Parliament also passed an act of indemnity for all offences committed during the revolutionary crisis, and appointed a Council of Regency, the young sovereign being only fifteen years of age.

The weakness of the Crown in the second Edward's reign had prevented all violent measures for raising supplies by the Royal authority alone. But his son, Edward III., whose wars occasioned a great increase of expenditure, was frequently induced to exert the prerogative which, like his grandfather, he always asserted, maintaining that the famous statute of 1297 had not validly abridged it. He contended that he had the right to impose tallage "in cases of public emergency, and for reasonable cause;" nor would he even so far

yield to the representations of the Commons as to declare such imposts illegal, always adding a saving clause for these extraordinary occasions. He several times, in defiance of the statute "*De Tallagio non Concedendo*," levied a tallage of his mere authority. He did so in 1338, at the beginning of the war which led to his great naval victory of Blakensberg; and moreover had recourse to forced loans, and to seizures of all the tin and wool of the year, the *Maletolte* of his grandfather. Nevertheless, the war was extremely popular with both Lords and Commons; both urged him to prosecute it, and were satisfied with his promises that the *Maletolte* should cease in two years, to which effect a statute was made. In 1342, however, he was allowed to levy it for three years longer, by the assent of the Lords and a Council of Merchants, whom he had irregularly summoned, instead of assembling the Commons. The Parliament suffered this on express condition that no such maletolte should ever after be imposed. For some years he found that the grants of Parliament were a more convenient resource, and to these he confined himself. He yearly assembled his Parliament, and obtained grants for the prosecution of the war, illustrated as it was by the great victories of Crecy in 1346, and Poitiers in 1356, the capture of Calais in 1347, and the great sea-fight of 1350 in the Channel. The consequence of this constant recourse to Parliament was that taxation became in some sort regulated upon a system; and sometimes when the King had exceeded his lawful authority and imposed a tax, the Parliament would, after remonstrance, themselves grant the same duty, evidently for the purpose of preventing an illegal precedent, and wisely preserving the bulk of their constitutional privileges. On one occasion, in 1346, when he had issued an ordinance that all landowners should furnish knights and archers in proportion to their rental, and each burgh so much money, the Commons remonstrated; when he stated the necessities

of the war, and the assent of the Lords. 'This, however, did not satisfy the Commons; and he promised that it should never be drawn into a precedent. Several further remonstrances followed, and an act was passed, that for the future all such ordinances should be deemed contrary to the liberties of the realm; and further, that no petition of the clergy should be granted without the Council certifying that it contained nothing against the rights of the Lords and Commons. To all this the King assented; but when the Parliament further insisted that no statute should be made at the petition of the clergy without the consent of the Lords and Commons, he gave their request a civil refusal.

In raising men for the public service, the King, during the early reigns of the Plantagenets, appears to have been under less restraint than in raising money. This greater latitude arose from two causes: the pretext of danger to the State was always at hand —and the great bulk of the men levied were of the common people, whose interests were little regarded by the Barons, Knights, and traders that composed the Parliament. Hence we can trace hardly any limits to the King's authority in calling out his subjects on emergencies. In the Anglo-Saxon times, and even under the Anglo-Norman Princes, the reliance of the Crown was entirely upon the feudal services of the vassals with their sub-tenants; and it was a force much better calculated for home defence than for the operations of foreign war, because it only served for a limited time, and was seldom in the field. The number of men which the land was bound to furnish had so exceedingly decreased from the changes in the distribution of property, and from the neglect of the public servants who had charge of the musters and arrays, that they were supposed to have been ten times more numerous in the twelfth than in the thirteenth century; and the main reliance of the Edwards was upon contracts, for men properly equipped, made with the

Barons at the hire of enormous sums, as much as one shilling and sixpence a-day for a mounted archer (equal to thirty shillings of our money); and upon infantry raised by mere Royal authority in the counties. It was indeed understood that no man could be compelled to leave his county unless in case of invasion; but pretexts were never wanting of such threatened dangers; and it was often urged that the interest of the people was rather to fight at a distance than have their homes ravaged by the war. Not only fighting-men were thus pressed into the military service of the Crown, and vessels to carry troops abroad, sometimes all the shipping to be found in any of the ports, with as many seamen as were wanted to man them; but workmen and artificers were swept away in great numbers and exposed to the perils of war. Thus near 400 of these were carried over to the siege of Calais in 1348. As many as 1,100 vessels were seized in this manner and used by Edward III. before the battle of Blakensberg. When, in 1346, before Crecy, he issued the ordinance which has been mentioned above, the Commons complained of the practice as regarded levies of men, inasmuch as the landowners were affected by that proceeding, and not merely the peasants. An Act was in consequence passed forbidding the carrying of any man out of his county in future, excepting in the case of actual invasion.

Such was the struggle always maintained in those times between the Crown and the Parliament, that is, between the Sovereign and the great and little Barons and the mercantile classes, then first rising into importance. There were many infractions of the laws made to protect the subject, many invasions of the constitution as it was allowed to stand upon the provisions of the Charters, and the statutes confirming and extending those Charters. But the progress was steadily making towards a more exact observance of the law, a more secure enjoyment of popular rights, and a more

strict limitation of the Royal authority. The reign of Edward III. was distinguished, as we have seen, by an additional statutory declaration of those liberties and those restraints, both as regarded taxing and the levying of troops—if indeed the latter enactment be not rather to be regarded as a new chapter added to the rights of the people and the limitation of the King's power. Another statute in his reign regulated and defined the right or abuse of purveyance, that is, the exaction of provisions on the Royal journeys. A third, made in 1351, by what has been in consequence called the Blessed Parliament, abolished the fanciful heads of the old treason law, and confined that offence within known and narrow bounds, which it has, in the further progress of legislation, never materially exceeded, unless for short periods of time.

Hitherto, in tracing all the branches of the Constitutional progress in these three reigns, we have been upon well-known ground; but if we proceed further, and inquire into the constitution of Parliament, as regards the mode of its election, and the course of its proceedings, we are involved in extraordinary difficulties. The ancient authorities, for the reasons stated in Chap. x., are either silent, or give us very meagre information on those most important matters; and we know little more for certain than the result, without being able to ascertain the steps by which it was attained. Thus, though we know that the whole Freeholders, first the tenants *in capite*, and afterwards, but at a period unknown, also the sub-tenants of the Crown,* chose the Knights of the shire, we are little able to tell how the Burgesses were elected. The probability is, that all the Burghers in each town had a voice; but we cannot say what regulated the issuing of the writs to the different towns, and whether this depended on the

* Mr. Hume erroneously thinks that the statute 7 Hen. IV. gave rear-vassals their right of election; but both that and the statute 11 Hen. IV evidently assume that they already possessed it.

Royal will, or on that of the sheriff, or on the right of some towns to send representatives, and of others to be excused from the burden, as it was then considered, in consequence of the obligation to pay the members wages during the session. So we are left in some doubt as to the right of the Barons. All Prelates had seats in Parliament by virtue of their episcopal baronies; and all who held lands by tenure of barony had a right to sit. But how these were distinguished from the lesser Barons, the freeholders, and how far the King could withhold the writ, as well as how he was to distinguish the classes of Barons, we are imperfectly informed; only we may affirm, that a large discretion in this respect appears to have rested in the Crown. —Again, mitred Abbots had seats at first as well as Bishops; and their right to sit only ceased upon the dissolution of the monasteries in Henry VIII.'s reign.

Beside Barons, lay and clerical, the Judges and Privy Councillors were also summoned to Parliament, and formed part of the upper or Lords' house when this was separated from the lower. They at first sat and voted as well as attended; but at what period they ceased to be component parts of the Lords' house, and began to attend as assistants only (which the Judges do still), we are unable to say.

The number of the County members was generally two from each shire; but in the 11 Edward I. four were chosen. The Burghs were, about the same period, not more than twenty: each of which chose two members. In the reign of Edward III. the Burghs amounted to one hundred and twenty, and continued of this number till Elizabeth's time.

The precise period at which the Commons first sat apart from the Lords is equally unknown: indeed, it is perhaps less known than any part of the Parliamentary history. It can hardly be supposed that the different orders ever sat together after the Burghs sent members. At first the Knights sat, in all probability, with

the Barons, and afterwards with the Commons. That in early times the separation of the orders, and even of different members of the same order, was frequent, there remains clear proof. In 1282 the members for towns north and south of Trent met in different parts of the kingdom, and each came to separate resolutions as to supply. In 1360 the Commons met in as many as five different places. Nothing can more clearly show that the purpose in summoning the Commons was to obtain grants from them of supply. The clergy met in Convocation, and taxed themselves in their separate character. The Prelates who attended Parliament formed an entirely different body from that properly representing the Church; they sat as holding their lands and their bishoprics generally by the tenure of barony, and in this respect were exactly on the same footing with the lay Barons.

The Commons only by slow degrees obtained a full equality with the Lords; they were admitted gradually to an equal voice upon the greater concerns of the State. All questions respecting the succession to the Crown, the guardianship of the infant Sovereign, the Royal marriages, treaties concerning the foreign possessions of the realm—all questions, indeed, that did not immediately concern the imposing of taxes or regulation of trade—appear to have been confined to the cognizance of the Lords. But the Commons occasionally took the opportunity of a difficult crisis to interfere, at first only with their assent, and in support of the prevailing party in the Lords, generally by an almost unanimous resolution; and in the time of the first Plantagenets there are few instances of even this interference. The ordinary course of the Crown was to consult the different orders upon different matters; and no one order was held entitled to have its assent asked as necessary to the passing of any bill that did not affect its separate interests. The whole were

only understood to be consulted of necessity on matters affecting the whole, and the Commons hardly ever upon the higher affairs of State. Thus the Lords were entitled to refuse their assent to bills affecting the Peerage or Prelacy, and generally on the *ardua regni*, and the Burgesses on matters affecting trade. But the Commons were not entitled to be heard on measures of the former description, or the Peers on those of the latter. Thus in Edward III.'s time a duty of 2*s.* tonnage on foreign wines, and 6*d.* in the pound on goods imported, was granted by the Citizens and Burgesses only, the consent of the Lords not being held necessary, as they were not supposed to be interested in the matter. Edward attempted once or twice to carry this notion much further, defending his imposition of duties on foreign merchandize upon the pretext that it was paid by foreigners, and did not affect his English subjects. But the Parliament remonstrated, and generally obtained his consent to abstain from such impositions.

Another course was more than once resorted to by him upon the same principle He would assemble one class, as the foreign merchants in London, and ask an increase of the duties imposed by Parliament, in consideration of granting them certain commercial privileges. They agreed; and he then issued writs to all the towns that he might meet the members from each and offer them the same privileges on the same conditions. They met in an irregular kind of Parliament, and very wisely refused his offer. Another proceeding of his was liable to less objection, though it would at this day be deemed very irregular. He would assemble the Lords and obtain their approval of some measures, or the Lords and Knights of the Shire, or Deputies from the merchants, and thus fortified would hold a Parliament and propose the bill to them. But it was also usual to hold assemblies of the Lords apart from the Commons, and these were

termed Councils rather than Parliaments. If any of the Commons attended, they were there only in their capacity of great officers of State or Privy Councillors; and it could but rarely happen that these offices were held by any but the peers, lay or ecclesiastical.

The time of holding Parliaments was, as we have seen, early the subject of legislative enactment. In Henry III.'s reign, in Edward I.'s, and in Edward II.'s, provision was made that Parliament should be holden yearly at the least. In Edward III.'s time a new Act was passed requiring a Parliament to be held every year.

When the Parliament met there was generally an adjournment, to give the members time to arrive. The Chancellor then explained the King's reason for assembling them, and directed each order to go to its own chamber. Two committees were then appointed of what was called *Triers*—that is, to examine and decide on petitions. The Lords chiefly occupied themselves with such subjects, administering justice in the last resort, deciding cases when the Judges differed or thought they had no authority, and granting relief generally on the application of parties. The number of petitions presented is said to have been enormous under the first Plantagenet Princes after Magna Charta. It is related that a practice grew up of lawyers getting counties to elect them, and then surreptitiously intruding the claims of their clients into Petitions or bills of the Commons, which thus appeared to back those claims before the Lords. This led to the statute prohibiting lawyers from being chosen knights of the shire. There was little chance of the merchants and others in burghs returning them.

All propositions in either House took the form of Petitions to the King for his order, assent, or edict, which thus had the force of law; and at the close of each session, the Clerks of the Chancery reduced the whole to the form of Statutes, which were then sent

to the Judges for their guidance, and to the Sheriffs of Counties for general publication. But it thus often happened that the matters in the bills underwent great alteration; that the King caused the redress which the Parliament had sought, and which he had promised them, to be omitted in the statute; and that the clerks themselves, from carelessness, ignorance, or sinister motives, changed the terms of the law. It also constantly happened that as soon as the supplies were granted Parliament was dismissed by prorogation; the promised redress was forgotten; and the King's officers and others, whom the Acts commanded to do certain things, entirely disregarded the command. Indeed, the King even claimed a right to alter in his Privy Council the provisions of the Acts that had been passed during the session. These abuses, which never could at any time have been the law, were complained of, and regulations were made to prevent them in future. The Commons required that all enactments should be put into their final shape before the Parliament was prorogued; and in 1354 a statute was made strictly forbidding any alteration whatever of an Act after it had been made, without the consent of both Houses. It was not so easy to compel the strict execution of the laws made, and we meet with constant complaints of their being inoperative.

It is remarkable how the careless manner of preparing Acts of Parliament has been handed down even to our day. It is a remnant of the "olden time," and of the practice of leaving everything to the clerks, that there is at this day so very imperfect a security against careless or wilful error, or alteration in the most important of all records—that of the statutes of the realm. There is no true record, no *constat* of even bills being read as often as the law of Parliament requires, nothing except a mere note of the clerks of the Houses; and when an alteration is made in a bill by one House, it is made on an unsigned and wholly

unauthenticated slip of paper. A serious irregularity lately arose in this way, and gave rise to much discussion.

The imperfect provision made in the old Acts for carrying into effect the avowed intention of the legislature is well known. Thus when an aid, or a tallage, or a subsidy was granted, the machinery for raising it was left undescribed. A tallage was in fact a property-tax, and the Act granting it gave in a few lines what it takes now a hundred pages to describe. The whole manner of levying the money (a thing fully as important to the subject as the amount to be levied) was left in the King's discretion. The greatest oppression having been suffered in Edward II.'s time from his collectors, Edward III. fell upon an expedient which gave very great satisfaction to all, though it was certainly an unauthorized act of legislation in itself: he appointed commissioners to compound with each county and each town for the amount which they should pay towards the tallage or subsidy that had been granted in general terms by the Parliament.

When the King dismissed, prorogued, or dissolved the Parliament (and it seldom sat more than one session), a committee was sometimes appointed of the Lords to sit during the recess, for the purpose of finishing the judicial or administrative business which had proved too bulky to be despatched during the session, the time being always very short during which Parliament was kept together. Abuses arose out of this practice, the committee assuming powers of a legislative kind; and another practice of a far worse nature was resorted to in troublous times, of which we have seen already two instances under Henry III. and Edward II., that of delivering over the Prerogative of the Crown and the legislative power of Parliament to a select committee, always composed, like the Vacation Committee, of Lords only.

The constitution of Parliament appears to have undergone little or no alteration from the time of Edward III.; but its functions became gradually better defined. The authority of the Commons was pretty regularly on the increase; and the privileges of its members became more fully secured. In the turbulent reign of Richard II. the Lords alone gave absolute power to the Duke of Gloster during the King's minority. But the Commons carefully looked after the public expenditure, required to have the inspection of the accounts, insisted on the supplies being enrolled, in order that the expenditure might be better examined, and only granted a subsidy on finding that everything had been regularly carried on. This was in 1378, and next year the King offered to produce all accounts; when the Lords chose a committee of their number to examine even his household expenditure. The Parliament having now required that the ministers of State should be chosen with their consent, and having imposed a poll-tax, the well-known insurrection of the common people under Wat Tyler broke out; and the sufferings of the villeins or serfs, the bulk of the people, excited such fury that the King granted a charter of emancipation to appease it. The aristocracy immediately revoked this grant. The Commons now required, for the first time, the removal of one obnoxious minister,—Suffolk, the Chancellor: the King said he would not at their desire displace the meanest scullion in his kitchen. He was, however, forced to yield; and Suffolk was at first dismissed, then impeached. The Lords now appear to have usurped the powers of the Government, which they handed over to a committee of their number, creatures of Gloster, with legislative as well as executive authority, as in Henry III. and Edward II.'s time. This happened in 1386, and the next Parliament was devoted to that ambitious Prince. The Commons, however, suddenly took part with the

King,* protected him in his resumption of the Royal authority, and even after his murder of Gloster, helped him to pass the statute of Provisors, which finally excluded the papal power, and established the Royal authority in all ecclesiastical appointments; and they gave him both a subsidy for life, and appointed a committee of his creatures, vested with supreme legislative powers. The result is well known; an universal disgust was excited by a revolution which changed the government into a despotism—a revolution, too, effected by the people's representatives, and for the benefit of a Prince whose life was as disreputable and base as his capacity was mean. Henry of Lancester was enabled to dethrone and murder him; and that family reigned for two generations peaceably, for a third with constant resistance and various fortunes during a desolating civil war. But the infirm title of the Lancastrian Princes, although supported by the universal consent of the country, and backed by the great talents of the first and the brilliant victories of the second monarch, was in that early age a source of such weakness, that none of them ever ventured upon any excess of the legal prerogative; all of them were fain to await the will of their Parliaments for grants of money, and all of them suffered the privileges of Parliament to grow up and be consolidated.

Thus Henry IV. was no sooner seated on the throne than a Parliamentary declaration was made, that all transfer of the supreme power of legislation to any committee of Parliament was illegal. The interference of the King in elections, which had first been practised by Richard II., was complained of as soon as the importance of the Commons came to be partially felt; and the sheriff was restricted from exercising the power he had hitherto assumed of returning persons

* Nothing can be more obscure and more defective than the accounts which have reached us of all these sudden changes.

not chosen by the true majority of votes. Moreover, the Commons now began to interfere with all parts of the administration, and to insist upon being consulted on other matters as well as on questions of taxation. They were allowed to have freedom from arrest, though an Act to declare this immunity was at first refused, and only granted in the reign of Henry VI. They claimed freedom of speech; and on the sentence which had been passed on Haxy, one of their members, in the last reign, for words spoken in Parliament, being now reviewed, a complaint was made of the Speaker making verbal speeches to the Lords and the King—a practice, however, which has been continued to our time, and which gave rise, within my recollection, to a formal motion against Mr. Abbot, supported with great ability, and characteristic and hereditary love of liberty, by my excellent friend Lord William Russell,—that Speaker having taken upon him to pronounce an opinion against the Catholic question while addressing the Throne at the close of the session. The false entries made after the end of the session were again complained of, and it was agreed by both Houses that these should be in future made in presence of a joint committee. Grievances were regularly stated, and redress promised, previous to any supply being granted. The King was even obliged to send out of the country on one occasion persons distasteful to the Commons, among others four foreign attendants on the Queen, and against whom the King vowed that he knew no ground of complaint whatever but that the two houses disliked them. About 1401 a most important step was made by the Commons. They required that in each grant the appropriation of the money should be determined; to which the King assented, excepting only such moderate sums as might be left at his free disposal.

The brilliant career of Henry V., and his marvellous achievement of nearly conquering France, and obtaining the French crown, which a singular combination of

accidents, aiding the gallantry and skill of his military operations, enabled him to perform, while it gratified the vanity of the nation, and made his wars as popular as they were pernicious to the country, had no effect whatever upon the balance of the constitution. On the contrary, while he always obtained his resources from the grants of the Commons, he treated respectfully their complaints; pledged himself that no alteration of the statutes, when made, should ever be permitted without their consent; and, what had never before been distinctly admitted, and what was directly contrary to the understood rule and practice in the time of the Edwards, he agreed that no statute should have any force or effect without their express assent, although they granted him the tonnage and poundage for his life—a thing never before done except in Richard II.'s reign, and on the eve of his usurping absolute power. Henry laid before them his negotiations with the Emperor Sigismund, and he applied to them for interposing the security of Parliament to the loans which his wars obliged him to contract—a precedent now first given, and unfortunately followed afterwards to so ruinous an extent.

To his unhappy son he bequeathed the crown of France as well as England; and his quiet inheritance of both would have been ensured by the great genius of his brother, the Duke of Bedford, if anything could have maintained such a conquest, or anything could have quieted the English Barons. But beside losing his foreign dominions, this ill-fated prince was doomed to pass a life of thraldom, of deposition, of constant vicissitudes, while his kingdom was torn by the most violent factions, and his people became a prey to all the evils of civil war. In the earlier part of his reign, indeed, he was only nominally on the throne. From his accession, at nine months' old, to the age of twenty-one, he had little or no power. The regency was committed to a Council and a Protector by a

resolution of the Lords, without any interposition whatever of the Commons. Thirty-two years afterwards, when he had fallen into a state of mental alienation, the Lords alone appointed a committee of their number to visit him, and ascertain his capacity; and on their report an Act was passed appointing a Protector. He recovered his reason and his authority some time after. He again fell ill, when the Commons went no further than to request that the Lords would provide for the emergency by appointing a Protector. They named York accordingly. He required as a condition to his accepting the place that his authority should only be determined by the King in Parliament, with the advice of the Lords Spiritual and Temporal. By the Lords alone, then, was the defect of the Royal authority supplied; and they named the great officers of State, as well as the Protector, without any interference of the Commons. On one occasion, while Henry possessed his authority, the Commons, who never were consulted on such high questions, unless when a grant of money was required, or a statute was to be passed regulating the administration of the government, yielded to a popular clamour wholly groundless, and impeached a minister, Suffolk. The sentence of banishment was not pronounced by the Lords, but by the King alone—the Lords protesting that it was his act, not theirs. The mob, as is well known, dissatisfied with the punishment, put him to death. To speak of this period, therefore, as one of the least authority upon questions relating to the Regency, or indeed to the powers of either house of Parliament, seems one of the wildest and most unreflecting errors that could be committed. Nevertheless, in the discussions on the Regency, 1789, no precedents were made more the subject of reference and argument than those furnished by this troublous reign: a singular proof of the value attached to precedents, and the disposition blindly to consult them!

In some respects the Commons made progress during those times. They obtained that Parliamentary recognition of the privilege to be free from arrest which Henry V. had refused. They likewise were allowed to pass statutes regulating the modes of election and preventing false returns. Early in this reign, too, the qualification of forty shillings was fixed to the right of voting for knights of the shire,—an encroachment certainly upon the rights of freeholders, but a clear proof of the growing value attached to a seat in the lower House.

The conduct of the Parliament, both Lords and Commons, in the times of which we have been treating, was as bad as possible in all particulars save what related to their own privileges. The nation can never be sufficiently grateful for the steadiness with which they then persisted in establishing their legislative rights, and their title to interfere in the administration of public affairs. But their whole conduct towards individuals and parties, the use they made of their power, was almost always profligate and unjust in the greatest possible degree. During all Richard II.'s reign, all Henry VI.'s, all Edward IV.'s, and Richard III.'s, up to the accession of Henry VII., they blindly followed the dictates of the faction which had the upper-hand—the prince whose success in the field had defeated his competitors, the powerful chief whose authority prevailed at the moment. The history of their proceedings is a succession of contrary decisions on the same question, conflicting laws on the same title, attainders and reversals, consigning one day all the adherents of one party to confiscation and the scaffold, reinstating them the next, and placing their adversaries in the same cruel predicament. Thus, in 1461, on Edward IV.'s victory, they unanimously attainted Henry VI., and all his adherents, including 138 knights, priests, and esquires, as well as princes and peers, and declared all the Lancastrian princes

usurpers. A few years after both Edward IV. and Henry VI. were actually prisoners at one and the same time. The next year Edward, who had not regained his freedom and his crown for many months, was fain to fly the realm, when all his adherents were attainted without exception. Richard III., notwithstanding the unusual horror excited by his manifold crimes, after a few months wearing the crown, which he had been offered by many of the Lords and some citizens and gentlemen, but by neither house of the legislature, found it quite safe to assemble a Parliament, which at once recognized his incurable title, and attainted all his adversaries. When the Earl of Richmond defeated and killed him at Bosworth, and took the crown offered him by the soldiers on the field of battle, the Parliament immediately reversed all the attainders of the Lancastrians, and declared the princes of that house to have been lawfully seized of the Crown. Nay, the Commons settled tonnage and poundage on him for life. They however added as a kind of condition, in which the Lords concurred, and to which he assented, that he should strengthen his confessedly bad title to the crown by marrying Elizabeth, the representative of the York family. At the same time, partly as a measure of finance, somewhat inconsistently with their opinion of the York title, they attainted, that is, confiscated, thirty of the York party, on the unreasonable and indeed unintelligible ground of having been in rebellion against Henry when he was only a private gentleman, Earl of Richmond. But it is to be observed that the statute limiting the crown to Henry and the heirs of his body, was made by the assent of the Lords at the request of the Commons.

Except in these Acts, in requesting Henry would marry, and in obtaining from Richard III. a declaration against the legality of the grants extorted by Edward IV. under the preposterous name of *benevolences*, the Commons never interfered in State affairs,

successions, regencies, or appointment of protectors, during these latter Plantagenet reigns, any more than they had done in the earliest periods of the family's history. Richard was chosen Protector by the Council, as Gloster had been named with a Council of Regency, on Henry V.'s decease, by the Lords alone—as Henry IV. had been by the Lords, when they declared Richard II. dethroned—as Richard of York had been declared also, by the Lords alone, heir to the crown on Henry VI.'s decease. The Lords too declared Edward IV. King after the battle of Barnet. The aristocratic form of the government is sufficiently proved by these passages; by the power of the Barons, which disposed of the crown repeatedly in the field as well as in Parliament; by the arbitrary authority occasionally conferred upon committees of their own body. It was only by slow degrees, and after the Crown had succeeded in curbing the Baronial influence, during the next period of our history, that the Commons could be said to have obtained their full equality with the Lords in the frame and practice of our Constitution. To this fourth period, the reign of the Tudors, we now proceed.

CHAPTER XIV.

THE GOVERNMENT OF ENGLAND UNDER THE TUDORS.

NOTHING in the history of Government so strongly illustrates the position, that the tyranny of rulers and the liberties of their subjects depend still more upon the manner in which the people and their leaders act, and as it were work the constitution, than upon the frame of the government itself, as a comparison of our history under the Plantagenets and under the Tudors. The powers of the Crown and of the Parliament, the political institutions of the country, its municipal as well as its organic laws, were the same under the two lines of Princes; nor had any event happened, except the destruction of the ancient nobility, to arm the latter family with a force not possessed by the former race; and that important event had not taken place all at once, by any sudden revolution, but by a series of civil wars, with their consequent attainders and confiscations, which left hardly any of the old baronial families, and substituted in their room a number of new ones, neither possessing the same large domains, nor enjoying the same influence over their vassals, nor holding the same place in the public estimation. The great diminution of aristocratic power, that is, of the feudal aristocracy, thus occasioned during a century, from the reign of Richard II. to that of Richard III., had not materially increased or confirmed the power of the Sovereign, partly because of the infirm title of the House of Lancaster during the earlier portion of the period, partly because of the constant struggles of the King for his crown with one party or other of the Barons during the remaining, and greater portion of the time.

But when Henry VII., by his marriage with Elizabeth of York, put an end to the contest of the two Roses, it was of great importance to the Royal authority that the feudal power had ceased to be formidable. Nevertheless, no change whatever had been effected in the fundamental principles of the constitution from the time of Edward III.—hardly, indeed, from that of Edward I.—as far as the extension of the prerogative was concerned; and the progress of the constitution had, since the decease of Richard II., been altogether in the opposite direction, of confirming the rights of Parliament, and extending the influence of the Commons over the administration of public affairs. The Tudors, however, reigned with a more absolute authority than their predecessors had possessed.

The better title of these monarchs no doubt contributed much to their increased authority as compared with that of the Plantagenets, who immediately preceded them. But they owed still more to the state of their finances. Almost all the concessions which had been obtained from the Crown for the last two hundred and fifty years, had been extorted by the pecuniary difficulties in which the successive princes were placed, first, from the defects of the feudal policy, throwing the Sovereign upon the resources of his land revenue and the services of his vassals, afterwards from the expensive wars carried on upon the Continent. Henry VII. was the first of our kings since Henry III. who ever lived within his income. His avaricious habits inclined him to rigid parsimony. When the grant of tonnage and poundage for life was made to him, he found that he could gratify his propensity to accumulate without having recourse to Parliament for supplies; and he only applied in 1504 to that body for the feudal aids on knighting his eldest son and marrying his eldest daughter. So little, however, was he in want of their liberality, that he accepted but £30,000 of the £40,000 which they granted him. The treasure

which he left enabled his more brilliant and spendthrift successor to go on, if he had so chosen to do, for some years without a Parliament. Thus, had it not been for Perkin Warbeck's rebellion, which gave room to forfeit the estates of those attainted for adhering to him, there would have been no Parliament assembled from that which ratified Henry VII.'s title in 1485, to that which he called in 1504 for a special purpose, nor from that till his son's in 1517; and as the Parliament of 1494 only met for a few days, on account of the rebellion, and that of 1507 for a like period, these two princes might have ruled without any national assembly for a period of above thirty years. But a comparison of the number of Parliaments called by the Tudors and the Plantagenets will set this in a very clear light. The first three Edwards reigned 105 years, and called 119 Parliaments. The five Tudors reigned 118 years, and called only 58, not nearly half the proportion. The whole Plantagenet reigns from Edward I.'s accession to Richard III.'s were 205 years; and there were called 193 Parliaments. Even if we deduct the several Parliaments held in the same year, and take it by years, the Plantagenets held Parliaments in 130 years of their 205 years' reign; the Tudors only in 56 years of their 118. Edward III. held 53 in the 50 years of his reign; Edward I. 49 in 35 years; while Henry VII., in 25 years, held but 7; Henry VIII.,* in 37 years, 21; and Elizabeth, in 43 years, only 13.

But the conduct of the Parliament in the reign of the first Tudors presents the most degrading and the most disgusting spectacle which our history has to record. The successive Parliaments in Richard II., Henry VI., and Edward IV.'s reign were subservient to the faction of the day, and committed violence by

* These numbers are taken from the Statute Book, which omits several Parliaments; but the proportions are probably not varied by such omissions.

wholesale upon whatever party happened to have lost the superiority in the field. But it is more offensive to all feelings of honour, and betokens a baser spirit, or rather a more complete want of all spirit, that the same body, without any revolution having happened in the state to inflame men's passions, or any physical force having been actually impressed upon it, should for the whole of a long reign have made itself the unresisting instrument of whatever oppression a ferocious tyrant could devise for gratifying his cruelty, his lust, or his caprice. Upon one only occasion can we perceive any disposition to resist Henry VIII.: it was in 1525, when he attempted to levy a tax, and afterwards a benevolence. The clergy, whom he first attacked, excited the citizens of London to object; and the Parliament remonstrated, first against the illegal exaction of the tax, afterwards against the demand of a benevolence, as against the statute of Richard III. Nevertheless, the King obtained what he sought, forcing men to compound for fear of violent treatment; and no step whatever was taken to make those answerable who were the instruments of his oppressions—those, for instance, through whom Henry sent an alderman of London to serve in the Scotch invasion, as a punishment for refusing to contribute.

Let us, however, enumerate some of the statutes which were made, and which were immediately acted upon in defiance of all justice and all principle, though not of law.

It was made treason to deny the King's supremacy, though two years before this notable law, to assert it would have been deemed rather insanity than wickedness. Under this act Bishop Fisher and the famous Sir Thomas More both suffered death. It was made treason for any person to marry the King after leading an unchaste life in any respect. To have any criminal conversation with any of his reputed children, with his sisters, aunts, or nieces, was in like manner

made high treason. The marriage with Catherine was declared invalid in the face of the whole facts of the case; and the marriage with Anne Boleyn and the legitimacy of her issue were declared by law, with the penalty of imprisonment and forfeiture against all who refused to swear to it, and of death against all who slandered either the Sovereign's or their issue. Then, when he tired of Anne Boleyn and put her to death by a mock trial, the Parliament declared that the same marriage had from the beginning been void, and the issue counterfeit or bastard. Not only did this servile body gratify all his caprices in respect of his wives and progeny, marrying and unmarrying him, legitimatizing and bastardizing his issue, at his nod; but in settling permanently the order of the succession they allowed him to alter that order, and to entail the Crown at his pleasure; and thus gave him a power of disturbing the realm, of plunging it once more into all the horrors of civil war, the security from which is really the only benefit, except their share in the Reformation, that the country owes to the Tudors. Their full gratification of his rapacity was in part owing to their timid servility, in part to their religious zeal. But how great soever may have been the benefits derived from suppressing the monastic orders or the exclusion of the Abbots from Parliament, it must be allowed to have been purchased at a high price, when we reflect, first, on the wholesale confiscation of the property belonging to nearly 900 bodies, beside above 2,300 chantries and chapelries; next, on the scandalous perversion of all justice by which the parties were by thousands condemned to poverty and stigmatized in their reputation, unheard and before a judicature of their enemies; and, lastly, on the use made of the spoil thus greedily seized upon false and slanderous pretexts, or given up with reckless profusion to the tyrant, and parcelled out by him among the creatures of his favour, the tools of his oppression. Whatever

victims he chose to destroy, the Parliament attainted, often without hearing them in their defence and against the bills. This was done, too, after they had asked the opinion of the Judges on the possibility of reversing in a Court of Law a statutory attainder, and after the Judges had stated, that though such judicial reversal was impossible, yet it became the Parliament to set an example to all inferior judicatures of not violating the principles of justice. Thus Cromwell, having lost the tyrant's favour because he had recommended the marriage with Anne of Cleves, and Henry had tired of her, the Parliament readily attainted him of treason and heresy without any hearing; and they did the like by Dr. Barnes, who was burnt for heresy. Many others shared the same fate. Anything more ridiculous than the reasons alleged can hardly be conceived. Surrey, the most accomplished nobleman of his age, suffered death by Act of Parliament, because he had quartered the Royal arms with his own; and this the savage despot called treason.

Three Acts of Parliament, however, stand out before all the rest in their infamy:—1. The King was, in 1529, formally released of all the debts he had contracted six years before, although his securities had passed into the hands of third parties, and many persons held them by purchase for various sums; and this abominable precedent was followed, in 1541, with the incredible addition, that if any one had been repaid his debt the money was to be refunded by him.—2. The King was empowered,* as a general law, on attaining the age of twenty-four, to repeal all Acts of Parliament made while he was under that age; so that whatever was enacted during the Regency became of no avail unless he chose; and even after the Regency had ceased, he was suffered to rescind whatever had been done for six years.—3. The proclamations of the

* 28 Hen. VIII., c. 17.

King in Council, if stated to be made under pain of fine and imprisonment, were declared to have the force of statutes, provided they affected no one's property or life, and violated no existing law; but the King by proclamation might make any opinion heretical, and might denounce death as the penalty of holding it.*

The judicial, or rather, statutory, murders of Henry VIII. were far more numerous, and, in their circumstances, more revolting than those of his father. Yet that Prince must be allowed to have left him the bad example. He inveigled Warwick, the unfortunate son of Clarence, into a confession that he had contrived, with Perkin Warbeck, his escape from the Tower, where he had been confined since he was twelve years old; he was now fifteen. For this he was tried as for a conspiracy, and executed. Suffolk, a nephew of Edward IV., and near in the order of succession to Henry's Queen, had engaged in a conspiracy in the low Countries; and Henry, having obtained possession of the Archduke's person by the accident of his shipwreck, obliged him to deliver up the Earl on a promise of sparing his life. He died before he could, as he wished, break his word; but his dying injunction to his son was that he should put the Earl to death; which Henry VIII. did a few years after, upon the old attainder.

There was little difference in the disposition of the two tyrants, as far as an unfeeling nature and overbearing temper ministered to their absolute sway. But the son's more careless expenditure of money, more frank, indiscreet habits, and more affable manner, partaking, in outward show, of generosity, honesty, and even kindness, gave him a popularity in his own times, especially during the first half of his reign, which the father never possessed, labouring as he did under the two greatest drawbacks to popular favour that a Prince can have, avarice and reserve; while

* 31 Hen. VIII., c. 8.

the cruelty of the son's whole conduct has made him justly more abhorred by after ages, when the services rendered by his lusts, and his rapacity, and his caprice, to the cause of the Reformation can no longer blind us, as they did his contemporaries, to the enormities of his execrable character.

As much of the disgraceful subserviency of which we have been contemplating the fruits, was owing to the severe character of the first Tudor, and the violent temper of the second, we might naturally expect the Parliament to recover somewhat of its independence under the infant prince who followed them, and in the necessarily feeble government of a Regency. Accordingly, the first Parliament of Edward VI. abrogated all the new treasons invented to gratify his father's caprices.* Others of his bad and cruel laws were mitigated; though the power of proclamation was exercised by declaring all propagators of tales and lies affecting the Government liable to work in the galleys. An important improvement, however, of the Treason Law, the only constitutional gift of the Tudor race, was made during this reign; two witnesses were now first required† to convict. The illegal conduct of the Council of Regency, which owed its existence to Henry VIII.'s appointment under the powers of an Act made late in his reign,‡ and which nevertheless wholly altered the Regency's own constitution, and made Seymour, the King's maternal uncle, Protector, with full power, was submitted to without any objection or hesitation by the same Parliament; and his brother the admiral's attainder was easily passed by the same body to gratify that powerful nobleman.

The tendency of Parliaments in those times to obey the Royal dictates, is perhaps still more clearly seen in the early acts of Mary than even in all their subserviency to her father. The restoration of the Catholic

* 1 Ed. VI., c. 12. † 5 and 6 Ed. VI., c. 11, § 12.
‡ 28 Henry VIII.

religion and the Romish supremacy was accomplished by this young woman with a severe struggle, it is true,§ but accomplished by a person void of capacity, without any experience, unpopular in her address, only armed with the name and prerogative of royalty, only supported by her own fanatical firmness of purpose, and by the remains of the sect which had been defeated and crushed in the two former reigns. The resistance made, though ineffectually, to this change is rather a proof that religious feeling will arm men against the influence of their fears or their sycophancy; it was the only sure indication of the Parliament having recovered its tone.

The Spanish marriage, however, confirmed and increased the opposition which the Queen's bigotry at first excited; and her third Parliament rejected some of her favourite bills. The care taken by her to influence the House of Commons, where alone she encountered any opposition, illustrates this still further. Edward had added twenty-two burghs, of which seven were insignificant and easily influenced. She enlarged the number by fourteen, and she wrote also a circular letter to the sheriffs, directing them to recommend good Catholics to the electors; and the Spanish ambassador is believed to have applied the influence of money directly in favour of the marriage with Philip. The French ambassador addressed himself zealously to the same quarter, the Commons, while engaged in resisting the Queen's profligate and infatuated design of transferring her kingdom to the Spanish monarchy, and lavishly promised the aid of France against this abominable scheme.

In all these four reigns, as well as in that of Elizabeth, the criminal judicature of the Privy Council, exercised in one branch called sometimes the King's

§ Mary tells Cardinal Pole, in a letter to him, that the Supremacy Bill had not been carried without "contention, bitter discussion, and the utmost pains of the faithful."

Ordinary Council, sometimes the Council of Star Chamber, from the ceiling of the room in which it met, was a very important addition to the Royal authority, and a great restraint upon both the Parliament and the people. The Crown had recourse to this power originally in order to control the factions of domineering Barons, who, yielding to the forms of the ordinary jurisdiction, entirely defeated its substance by overpowering the juries and even the judges before whom they or their retainers were brought, and by whom their civil rights were decided. A statute had been made early in Henry VII.'s reign* confirming the jurisdiction of the Star Chamber in cases of combinations to obstruct the due administration of justice; and there can be no doubt that much benefit resulted from the interference of the body, in times when the feudal power reduced the judicial to a mere name whenever great men or their followers were concerned. The preamble to the statute I have just mentioned sets forth, that by the practices of the great men, the "police and good rule of the realm was almost subdued, and the security of all men living, their lands and goods, destroyed.†" But the most grievous abuses arose out of this Star Chamber jurisdiction; and the Sovereign was enabled by it, not only to intimidate all who would oppose him legally in Parliament, as well as factiously in the country, but to interfere with the administration of justice fully as much as the Barons had ever done, and more systematically. Not only did the Plantagenets and the Tudors commit to prison or ransom for heavy fines those against whom they conceived an ill will, thus depriving them of the protection of the common law, and signally violating the most remarkable provi-

* 3 Hen. VII., c. 1.

† Lord Bacon (*Life of Henry VII.*) describes as the evils aimed at by this Act, "combination of multitudes, and headship of great persons." These, as he observes, are the two main supports of force against law. The Statute of Fines, also made in this reign, gave another blow to the aristocracy, by facilitating the alienation of lands.

sion of the Great Charter; but they exercised a like control over members of Parliament who had offended them, and jurors who had given verdicts displeasing to them; committing such members and jurors, interrogating them, sentencing them to imprisonment, and only releasing them on payment of heavy fines. A capital jurisdiction was never exercised by them, at least directly; but it really amounted to the same thing, whether they sentenced obnoxious men to death or compelled timid jurors to find them guilty through dread of personal consequences. It was in this Council that all the Sovereign's more violent acts were performed, because he was thus covered over with an apparent authority by the concurrence of an ancient body. Mary committed by its sentence a knight to the Tower, for his opposition to her in Parliament, She committed to prison by a like order in Council all the jury that acquitted Throckmorton; four were released on acknowledging their offence; the others proving refractory were fined, some in the enormous sum of £2,000.

It even appears that individual Privy Councillors, assuming to be clothed, as it were, with an emanation of Royal authority, would commit persons who offended them. As late as the latter part of Elizabeth's reign (1592) there was a representation made by eleven of the twelve Judges to the Chancellor and Treasurer, complaining that this outrageous power was used to prevent parties from bringing actions, as well as to punish or threaten them for other lawful acts.

Other interferences with the administration of justice were likewise practised by the Crown. The Sheriffs selected Jurors according to the Crown's presumed, and frequently declared, wishes. That officer was always employed as representing the Sovereign in his Bailiwick. Thus we find letters from two of Elizabeth's Council, to which one Ashburnham had presented his complaint, but without prosecuting it,

requiring that the Sheriff of Sussex should not aid his creditors to molest him until the pleasure of the Council be known. An appellate jurisdiction in earlier times appears to have been exercised by the same body. A case, mentioned in Hale's MS., was lately cited by our Judges before the House of Lords (Reg. *v.* Milliss), showing that the Star Chamber had revised a judgment of the Common Pleas in a real action—a Writ of Dower.

The Star Chamber took upon it to superintend the abuses of the Press. It prohibited the circulation of Roman Catholic works, and ordered them to be seized. With its concurrence Elizabeth issued a proclamation for trying by martial law the importers of bulls and libels; another, denouncing capital punishment against those who attended riotous meetings, or committed acts of vagrancy; and a third, ordering Anabaptists to quit the realm, and Irishmen to return home.

The power of regulating generally all matters punishable by law, and of enforcing by particular modes things commanded by statutes which did not describe the means of their enforcement, was always, under the Tudors as well as the Plantagenets, assumed by the Crown; and within this general and important head came under both families the power of regulating commerce. But the Tudors much more rarely interfered to levy money without Parliamentary sanction; and Elizabeth only once appears to have done so, when she imposed a duty on sweet wines, and retained one of her sister's duties on foreign cloths. She also, in 1586, made the Clergy pay an assessment not voted by Convocation. Loans or benevolences were two or three times exacted by her, notwithstanding the statute of Richard III.; but her economy always enabled her to repay them; and she was truly said to have been the first sovereign in whose reign the constitutional right of Parliament to grant supplies was practically made of universal application.

The independence of Parliament generally was much more secure under her than under her father or her sister; and it showed a far higher spirit, notwithstanding her strong assertions of her prerogative, and her exalted notion of its extent. In her father's time the Commons had punished, with his concurrence, those who arrested members during the session. This under her reign became a common assertion of privilege; and both strangers and members were now severely punished for contempts of the House and its jurisdiction. Even with the Queen herself the Commons ventured to struggle, in a way very different from anything that her father would have borne. They disregarded her positive commands, intimated through the Speaker, that they should no longer discuss the question of her naming a successor; and though she continued to desire that they should leave matters of State alone, she nevertheless revoked her former injunction.

The Commons may be said to have obtained another victory over her in their remonstrance against Monopolies—an oppressive source of revenue, but one not denied to have been vested in the Crown. In the session 1571, though Bacon, the Chancellor, had, in answer to their claims of liberty of speech, renewed the recommendation against meddling with State affairs, the Commons began their struggle against that great abuse. The Queen, who set great store by this prerogative, calling it the fairest flower of her garden, desired them to spend little time in motions, and make no long speeches. The chief mover against monopolies (one Bell) was called before the Star Chamber and frightened; the Lord Keeper Bacon severely reprimanded them at the close of the session for meddling "with matters not pertaining to them, nor within the capacity of their understanding." Next year, however, the new Parliament chose Bell for their Speaker, but proceeded no further; indeed, they

seem to have been terrified by the proceedings in the Star Chamber at the close of the last session, and they begged the Queen, on presenting their bills, "not to form an ill opinion of the House if she should dislike them." The next time they met, the most bold and even violent language against her infringement of their privileges was freely used; and she was plainly told, that if they had committed faults, "so had she great and dangerous ones," and taxed her with "ingratitude and unkindness to her people." Wentworth, the person who had led the way in this freedom of speech, was committed to the Tower for a month, and reprimanded on being discharged when the Queen had forgiven him. At their next meeting, in 1581, the usual warning as to interfering in State affairs was given. Wentworth was again committed to the Tower by the House, and detained till its dissolution, for new acts of boldness in debate. Again, in 1588, he moved on the question of the succession, and was, with one who seconded him, committed by the Council to prison; as was another member soon after for presenting a bill against abuses in Ecclesiastical Courts, contrary to the Queen's injunction. She did not release them while the session lasted, although petitioned by the House on the ground that no subsidies could be granted from places whose members were in custody. At length, although in 1597 the Queen prevailed on them by soft and pleasing words to leave the remedy of monopolies to her care, yet finding she did not correct the abuse, in 1601, after four days' debate, and the refusal of the Commons to adopt the contemptible advice of Cecil and Bacon, that they should proceed by petition and not by bill, the Queen sent a message to promise a general revocation of all such grants as were found on trial to be against law.

The importance of the House of Commons in Elizabeth's reign, as in that of her sister and brother,

is evinced by the pains taken to secure an ascendancy in it. She added no less than sixty-two burgh members, chiefly by enfranchising petty burghs under royal or noble influence. The general attendance was under 240, and hence those new members must have given great weight to the Crown. The ministers and the peers also used every exertion to influence elections elsewhere.

The services rendered by the Tudors to religion, in freeing us from the yoke of Rome and the superstitions of Popery, have been more than once glanced at. But it must be recollected that these favours were bestowed with the characteristic tyranny of the family. Nothing can be more clear than the connection between Henry VIII.'s revolt against the Pope, and his desire to break his first marriage from his wish to espouse Anne Boleyn; and his adherence to the Catholic errors not only lasted for life, but was testified in the most arbitrary Acts of his reign,—Acts which his submissive Parliament almost immediately enabled him to pass. The very worst, perhaps, of all his statutes is that called the "*Law of the Six Articles*," or, as the Protestants termed it, "*The Bloody Act*," made after he had reigned thirty years and had separated from Rome five years. Some of the grossest errors of Romanism were there laid down as undoubted truths, including transubstantiation, the obligation of monastic vows, clerical celibacy, and auricular confession, and were commanded to be believed on pain of death, without power of escape by abjuring errors once uttered: so that if any person once denied the real presence, though he afterwards confessed his error and recanted, he was liable to be burnt.*

The cruelties of Mary are known and are proverbial; they have prevented us from reflecting how entirely her

* A denial of the other five articles was, in the first instance, punishable with forfeiture and imprisonment, and with death for a second offence, though followed by recantation.

Parliament, so lately Protestant, supported her in them, and how far her sister went in following her example. It cannot be doubted that the Reformation in Elizabeth's reign was carried by force, even by military force, as far as the people were concerned; for they adhered to the religion of their forefathers. Bishop Burnet, a witness wholly above all suspicion on such a point, is constrained to allow that she had to send over German troops in 1549 from Calais, on account of the Catholic bigotry of the nation at large. The use made of the Church revenues, too, deserves our attention. Henry VIII. was not the only sovereign who endowed great families out of this spoil. In Edward's time, Winchester and Canterbury suffered much for this purpose; Exeter and Llandaff were impoverished, and Lichfield was stripped to endow Lord Paget. Somerset House was founded out of Church lands by the Protector. Cecil's estate at Burleigh was made out of Peterborough: part of Hatton's in Holborn retains the name which shows that it had belonged to Ely; and Lord Keeper Puckering obtained it for a simoniacal prelate, that he might obtain a part of the estate on lease for himself.

Elizabeth, though friendly at all times to the Reformation, held the Puritans in far more hatred than the Catholics, on account of their republican propensities and their dislike of the episcopal discipline. It was against them that the Act compelling all persons to go to Church under pecuniary penalties was passed; an Act never yet repealed, and of late warmed into a noxious vitality, after being long torpid, in consequence of some magistrates having failed to convict some poor men of poaching.

The præmunire Act was extended so as to subject all the Catholics in the country to capital punishment for refusing a second time to abjure their religion—a law so cruel, that the Queen never ventured to execute it generally. An Act punishing with death any publi-

cation containing seditious matters, or defaming the Queen, was wrested to include the offence of writing against the Liturgy, and Puritans suffered death under this strange perversion. Many Catholics also suffered under an Act making it high treason to import bulls, relics, or crosses; and others, after being tortured to confess having denied the Queen's supremacy, were executed.

The Anabaptists were also persecuted; many driven beyond the seas; some burnt for heresy; sixty-one clergymen, forty-seven laymen, and two ladies, suffered death in misery for being Catholics during fourteen years of this Queen's reign. To all these vile proceedings Elizabeth's Parliaments were as willing parties, or as callous instruments, as their predecessors in the time of Henry and Mary. The support, therefore, of the Reformation, whether by the father or the daughter, is rather to be regarded as an indication of that body's subserviency and the Sovereign's power, than any proof of the progress that had been made by constitutional liberty.

Upon the whole, however, there can be no doubt that the Parliament had become more independent and the Crown more under restraint in the reign of Elizabeth, high as were her notions of prerogative, and submissively as her reproofs were generally received; and the Speaker, Onslow, was justified in his remark upon the difference between our government and those of the continental kingdoms—justified by the fact, but also justified by the safety with which in her time the Commons could address language to the throne such as her father would never have permitted to be used in his presence. "By our common law," said he, "though there be for the Prince provided many princely prerogatives, yet it is not such as that the Prince can take money or other things, or do as he will at his own pleasure without order; but quietly to suffer their subjects to enjoy their own without wrongful oppression,

wherein other Princes by their liberty do take as pleaseth them."

Let us now mark the main causes of the subserviency which so utterly disgraced the Tudor Parliaments, until under Elizabeth they gradually began to feel some sense of their duty, and to show, though but rarely and faintly, some spirit of resistance. For we must lay entirely out of our view in considering this subject the violent Acts of Henry VIII.'s Parliament, authorizing him to repeal statutes and giving his proclamations the force of law. These Acts were only, like the attainders in which they concurred with their master, indications of their submission to his will, and not real alterations effected in the Constitution, and enlarging the powers of the Crown. But the causes of that general submission, and the circumstances which enabled the Tudors to reign so absolutely in a limited Monarchy, were these:—

In the *first* place, the character of the Aristocracy, in whose hands the whole Parliamentary power was vested. They were a half-civilized, imperfectly enlightened, and exceedingly unprincipled body, just emerged from a state of feudal anarchy, repressed by the Sovereign's increased and constitutional authority, careless of what befel their countrymen at large, only anxious each for himself and his own retainers, and all willing rather to find protection in their individual power and following, than to seek it from the safeguards which the laws and institutions of a country provide for all both high and low within its bounds. No tenderness for liberty, no feeling for the rights of the community, no regard for the laws could be expected from a body so constituted. The Lords were always found ranged on the side of power and of the Prince. —*Secondly*, the Commons were exceedingly affected, as, indeed, were the less powerful of the Lords, by the powers which the Sovereign exercised through the Council, the Star Chamber. Examples were occasion-

ally made of punishing by fine and imprisonment discontented members; and the course of justice was, as we have seen, materially affected by the operations of the same force.—*Thirdly*—and to this I attach much greater weight, because otherwise the powers of the Star Chamber never could have stood against an united legislature—there was operating in favour of the Crown, and against all resistance, that principle which gives every established government the greater portion of its solidity, by preventing all effective opposition; that principle which enabled the triumvirs of France, in 1793, to domineer through terror over both the Convention and the people for nearly two long years of suffering and crime. Men distrust each other; every man fears to be made the sacrifice were he to move first; as no one in a mob will rush willingly on, till forced by those behind him, upon a single individual armed with a pistol; because each knows that though it can kill but one, he may be the one. Who could venture to protest for a moment against any of Henry's worst schemes of profligacy and cruelty, when he felt that an attainder would be suddenly propounded against himself, should he oppose the attainder pressed upon the legislature, and he must be the sacrifice to the honest discharge of a public duty? Nothing else can account for the obsequious and pusillanimous demeanour of the Parliament, first under the Plantagenets, but afterwards far more under the Tudors.

The personal character of these Tudor Princes entered for something into this account of their tyranny, because the main stay of their power was the terror which operated upon the Commons, with their distrust of one another, and their reckoning upon the Lords always taking the Sovereign's part. Accordingly we find them far more inclined to follow an independent course under Edward and the Regency than under any of the other four princes of that family. We also observe them kept down by dread of Elizabeth while

she was in the vigour of her faculties and the height of her pride. The favourite subject of the monopolies had been somewhat broached by the Commons as early as 1566; it was very openly taken up in 1572; but the fear of her indignation afterwards made them press it very feebly till towards the end of her reign, when her energy being impaired rather by the melancholy that clouded her latter days than by the hand of age, they could venture upon matters which at a former period they dared not broach.

CHAPTER XV.

THE GOVERNMENT OF ENGLAND UNDER THE STUARTS—THE COMMONWEALTH—THE RESTORATION.

The bold, determined, impetuous character of the Tudors suddenly found a great contrast in the feeble mind and contemptible manners of James I.; and though his capacity was far from mean, and his acquirements were very considerable, both his abilities and his accomplishments were of a kind the least useful on the throne; consequently the genius of Elizabeth, peculiarly formed for command, was as manifestly superior to his, as the vigour of her masculine nature surpassed his paltry disposition. Men were not slow to mark the change in the hand that now held the sceptre; the statesman perceived it in a day; the Parliament showed that they were aware of it on the morrow of their meeting.

Accordingly, with this Prince began the real contest between the Crown and the Parliament, which ended in the full establishment of our free Constitution. A movement in this direction had been made in Elizabeth's time; towards the end of her reign it had become very perceptible; and no attentive observer could doubt, that even under the same race of vigorous and able tyrants who had long filled the throne, the increased importance of the towns from the progress of commerce, and the daily diminishing influence of the feudal aristocracy, as well as the gradual diffusion of knowledge, accelerated with the spread of free principles since the Reformation, would in time have occasioned the same great and useful struggle. But the change of the family, and the character of its

first Sovereign, contributed much to bring on this conflict, and give it a turn favourable to liberty. This, however, was in no wise owing to any moderate views entertained by the Stuarts of their prerogative; on the contrary, they held this fully as high as the Tudors.

It has been remarked by writers on our Constitutional History, and particularly by Mr. Hallam, that, singularly enough, the family which held such lofty notions of Royal prerogative and rights of legitimacy (as they are now termed) should themselves have owed their succession to the very influence of which they most were jealous, deriving their sole title to the crown of England from the people, whose right to interfere with such high and sacred subjects they wholly denied. Perhaps this discrepancy between their title and their principles is more apparent than real. It is perfectly true that an Act of Parliament gave Henry VIII. the power of naming his successor, and limiting the Crown to any series of heirs whom he might choose to appoint in a will executed by himself. It is equally true that he named the Suffolk family, descended from his youngest sister, and passed by the King of Scots, issue of Margaret. Much doubt has been cast upon the point whether or not the will was signed by him; whether, as the lawyers say, the power was well or ill executed. The balance of evidence appears in favour of the due execution; and there was lawful issue of the Countess of Suffolk living at Elizabeth's decease. So far the succession of James appears to have been precluded by statute, and he only to have been let in by the voice of the Nation disapproving the Act of Harry's Parliament, which had, however, never been repealed, and by the recognition of his own first Parliament in a statute declaring his title. But there can be no doubt that the same persons who maintained the high prerogative doctrines of the Stuarts, would equally deny the right of Parlia-

ment in Henry VIII.'s time to set aside the elder or Stuart branch, and to substitute, by Henry's appointment, the younger. They regarded the title by hereditary succession as paramount to any legislative enactment. If any proof of this were wanting, surely it is furnished by the Jacobites persisting in regarding their Stuart Kings as the true and lawful Kings of England, after the Crown had been limited to a younger branch of the family, and possession held under that limitation for near a century. The inconsistency is thus rather apparent than real; though the absurdity of the Stuart doctrine is as flagrant as if it were not irreconcilable with itself.

James, in his proclamation for summoning his first Parliament, had required that neither Bankrupts nor Outlaws should be returned. One Goodwin, who had been outlawed, was returned for Buckinghamshire. The Return was refused at the Crown Office, and Fortescue was elected in his stead. The Commons, as soon as they assembled, unseated him, and declared Goodwin duly elected. This brought on a controversy with the King; and the Commons asserting their undoubted privilege to decide upon all elections, it ended in a compromise that neither Goodwin nor Fortescue should sit. Immediately afterwards, a member arrested for debt was liberated by a summary application to the Crown; and an Act was passed declaring the privilege of Parliament, and indemnifying the Sheriffs and Gaolers for setting free all members so committed to their custody. Moreover, when the King upon one or two occasions would take notice of speeches and proceedings in the House of Commons, they drew up a full statement of their privileges; and as he had referred to the freedom of speech asked and granted at the beginning of each Parliament, they distinctly affirmed that it was their right without any grant, and that their asking it was a mere form, and "words of manners only." He

persevered in alluding to their proceedings, and they persisted in complaining of this as against their undoubted privileges.

But he on one occasion went much beyond this, and ventured to impose a duty on currants imported. One Bates, having imported without paying the duty, was sued in the Exchequer, where the Barons supported the King's right to levy the customs, and used arguments still more base and slavish than their judgment. The Commons took up the subject, and the King desired they would not interfere. They however maintained, in most explicit terms, their undoubted right to discuss every one grievance of the subject; and so effectual was their resistance, that when soon after he would have raised money by making victuallers pay for a license to retail wines, he was obliged, by the representation of the Commons, to revoke his proclamation. It must be added, with some feelings of shame, that Lord Coke himself agreed with the Court of Exchequer in their judgment on Bates's case, though for very different and far less objectionable reasons; and in his Book he distinctly condemns the case as decided against law. (2 *Inst.*, 57.) The Court, too, over which he presided, declared the issuing of proclamations creating new offices to be unlawful, on the ground that the Crown had no power to alter the law of the land.

The authority of Bates's case and of Lord Coke's concurrence had encouraged the King to levy customs without Act of Parliament at the outports—the absurd distinction being taken by the Judges between these and the Port of London and Cinque Ports. But the Commons strongly remonstrated against this proceeding as wholly illegal, and refused all supply until these demands were withdrawn. The consequence was an interval of six years before any new Parliament was called; and, in the meantime, James was put to many shifts for obtaining pecuniary assistance. He was fain

to ask loans from wealthy citizens as a favour; and failing to get supplies from this source, he had recourse to his well-known expedient, the sale of Honours. He invented the order of Baronets, and sold the title for £1,000. About 200 were created, but not much more than half were at first so disposed of. One St. John, who had incurred his displeasure by writing a treatise recommending men not to advance their money by way of loan, was imprisoned by the Star Chamber and fined £5,000—a striking proof that even now, when the Commons had their attention strenuously directed to the Royal claims, and were occupied in maintaining the privileges of Parliament and rights of the people, they were not yet prepared for laying the axe to the root of the great evil, the illegal proceedings of that court. They, however, obtained from him an unlawful order, probably through that arbitrary court, prohibiting the publication or sale of a work which appeared, written by one Cowell, and asserting in the most absurd terms the absolute powers of the Sovereign and the insignificance of Parliament by the constitution of England. It must be added, that in all these struggles the High Church party uniformly took part with the Crown, and against the Parliament; and thus was begun that mutual enmity which half a century later overturned the Ecclesiastical establishment of the realm.

The attainders of individuals under the Tudors had formed the most hateful and disgusting part of their domination, and of the Parliament's pusillanimity. In James's reign the attacks upon individuals were almost all grounded upon sound and just principles, and did great good to the Constitution. They proceeded, not from the King, but the Commons, and not seldom were levelled at Ministers of the Crown. The right of impeachment had not been exercised since the Lancastrian Princes were on the throne. Now, all great delinquents were visited with its terrors. For

the Commons impeached Mompesson of frauds and abuse, and oppressive use of patents he had obtained; Marshall, his accomplice; Barnet, a judge of the Prerogative Court, for corruption in his judicial conduct; the Bishop of Llandaff for bribery; and Middlesex for bribery and official corruption. It must be confessed that the Commons carried occasionally their privileges somewhat further. The grossest case of oppression on record in the history of Parliament, one not exceeded by any act of the most despotic of Princes, is Lloyd's; but religious zeal here mingled with their own privileges. The King was understood to be less warmly interested in his support of the Elector Palatine against the Emperor than suited the Protestant tastes of the Commons. This unfortunate gentleman, a Catholic, was represented as having used expressions disparaging to the Palatine and his wife—a charge which, if ever so fully proved, could in no conceivable way touch the privileges of Parliament. He was sentenced by a vote of the House to ride ignominiously on a horse with his face towards the tail, to stand in the Pillory, to be whipped from London to Westminster, to pay a fine of £5,000, and to be imprisoned for life; and all of this iniquitous sentence he underwent except the whipping.

This Parliament, the last in James's reign, closed with an open quarrel between them and the King. A remonstrance respecting his slackness in supporting the Palatine, his son-in-law, drew from him a severe reproof, in which he ascribed their freedom of speech to the Royal forbearance. The Commons took fire at this, and asserted in the loudest tone their absolute independence and supremacy. He was far from yielding; and dissolved them with a new reprimand—adding, however, that he should continue to govern by Parliaments. But, as soon as they separated he committed several of the opposition leaders, among others Sir E. Coke and Mr. Pym, to prison.

While the Commons were thus establishing their power, and boldly facing the Crown, it is humiliating to think that the Judges, from whom so much better things might have been expected, showed, with one single illustrious exception, the most base subserviency, and the most unblushing abandonment of principle. Being asked by the King if he had a right to stay any judicial proceedings as often as he deemed his interest or the prerogative of the Crown assailed, all, except Lord Coke, humbly testified their submission to his demands, and in a tone of meanness and an abject spirit yet more disgusting than the answer itself. Little wonder, then, is it that we find Fuller, a lawyer, committed to prison, and there kept till he died—his offence being that he sued out a writ of Habeas Corpus for a client detained by the Court of High Commission; or Whitelock and Selden threatened with the like fate, and averting it by humble apology,—their offence having been, the just and true opinion they had given their clients that certain acts of the Government were illegal.

Notwithstanding these illegal acts, and notwithstanding the shameful dereliction of their most plain and obvious duties by the Judges, the liberties of the people gained prodigiously in James I.'s reign.—Now it was that the Commons first entered into a contention with the Crown for the vindication of their rights, and for the restoration of those securities to the lives and properties of their constituents, which had repeatedly been declared to be theirs by law in the various renewals of the Great Charter, and in the laws extorted from the Plantagenets.—Now it was that the encroachments of those Princes, and the still further usurpations of the Tudors, were exposed, and the only fit and effectual means taken to restore the constitution, and extend its spirit through its details. The greatest abuse of all, indeed, the powers assumed by the Privy Council in the Star Chamber and High Commission,

continued; but its operation was closely watched; and all men saw that the conflict which had begun between the Crown and the country, under the guidance of an unskilful Monarch, on the one hand, obstinate, perverse, presumptuous, but of limited capacity for State affairs, and the great men of the day, the Cokes, the Wentworths, the Pyms, must end sooner or later in a popular victory. The "universal fermentation," which Mr. Hume (Chap. xlv.) describes as about the beginning of the seventeenth century, occasioned by the revival of letters, then first became operative in the diffusion of knowledge among the people, at least among the bettermost classes, enlarged men's ideas, and by a necessary consequence led to discussions of political rights, and dissatisfaction with abuses of all kinds; and, fortunately for the cause of constitutional freedom, this was the very period chosen by the Stuart family and their infatuated adherents in Church and State for promulgating the highest notions of arbitrary authority, contemning all popular privileges, and setting the Sovereign above all human ordinances by a right claimed as inherent in the blood of Princes, and derived immediately from Heaven. The frankness with which these revolting doctrines were openly and explicitly proclaimed, although not at all greater than was shown by their Tudor ancestors, produced a far more strenuous opposition, because the age to which they were addressed was very differently instructed, considerable progress had even been made by the Parliament in an opposite direction, and the freedom of religious opinion inculcated by the Reformation was calculated inevitably to extend itself also to State affairs. It was another blessing derived from the same family, that their capacity was far inferior to their pretensions —that the unyielding obstinacy of their nature was supported by no skill, not always by adequate firmness in pursuing its object.

It was in these circumstances that the memorable

reign of Charles I. began, and that the struggle between the Crown and the Commons descended to him from his father with that crown, and lined it with thorns.

In character he materially differed from his predecessor. More courageous, more manly, of more winning address, of less pedantic conceit, and, though not deficient in accomplishments, yet not priding himself on those which fit men rather for the contests of the college than for those of public life, he was, nevertheless, far less honest and sincere, more unforgiving, quite as selfish, and altogether as much imbued with the notions of his paramount rights, and his contempt for those of the people. His private conduct was more pure, and his religious impressions more strong; but he as easily tolerated breaches of morality and decorum in others; and in religion he was as intolerant, with a leaning towards Popery, which was enlarged by an imperious and bigoted wife, and a profligate, unprincipled favourite (Buckingham), fondly cherished by him as he had been by his father, recommended by none but superficial accomplishments and abandoned character, and who proved one of the chief banes of his early life.

His first measure in this warfare to which he was doomed must be allowed to have been as bad a one as was possible, for it was a trick; it deserved not the more respectable name of a stratagem. He caused the popular leaders to be named Sheriffs, that they might not be returned to Parliament; but the only consequence was their being chosen for other places. Thus, Coke, the avowed leader of the Opposition, was elected for Derbyshire instead of Norfolk, of which he had been named Sheriff. His next step was of more open violence, and according to the very worst example of past times, no longer safe to be followed. Digges and Elliot, two of the most distinguished friends of liberty, were cast into prison for words

spoken in Parliament; for having taken part in the impeachment of the favourite. This ill-judged step was no sooner taken than retracted, on the House declaring they would proceed to no business until their members were released; and he was fain to confess that he had been mistaken. A peer, too, Arundel, whom he had imprisoned, was released on the claim solemnly made by the Lords that none of their members could be arrested unless for treason, felony, or a breach of the peace. They gained another success on the important right of each Peer to have his writ of Summons, which had been refused to Bristol, and which was now issued on their remonstrance.

To screen Buckingham, whose fall he perceived was doomed, Charles now had recourse to a step which he repeated several times, in spite of the warning he each time received, that of dissolving the Parliament—the result inevitably being a new one afterwards elected, with increased hostility towards the Royal authority which had put an end to the old. Money had been voted, but no bill passed; and he foolishly thought he might assess all his subjects to a loan of the amount voted, each according to the portion he would have paid if the subsidy had been enacted by law, requiring the names of those who refused their money to be reported before the Privy Council. This was followed up by pressing the inferior people to the Navy, and ordering only gentlemen to be committed by the Council. Five of these, including the illustrious Hampden, sued out their Habeas Corpus, and the return being that they were detained according to the exigency of the commitment, the sufficiency of the return, and consequently the validity of the writ of commitment, came before the Court of King's Bench, the Judges of which, to their lasting disgrace, decided in favour of both. But the King was forced to call another Parliament, the third of his reign; and now was assembled that truly illustrious body to whose

wisdom and fortitude we owe our liberties, in spite of the over violence by which its successors outdid its great example, and the inexorable tyranny of the faithless Prince with whom they had to deal.

Bent on his destruction, while yet the elections had not been finished, Charles at the moment that he paid court to his subjects, by releasing persons from unlawful imprisonment, employed Commissions to raise money just as unlawfully, their orders being "to regard the necessity of the substance more than the form and circumstance;" in other words, the want of supplies for an impolitic war of the favourite's advising, rather than the illegality of robbing the people against law. The result was that famous proceeding, the Petition of Right, whereby the Lords and Commons obliged the King to declare the illegality of requiring loans without Parliamentary sanction, or billeting soldiers, or commitment without legal process, or procedure by martial law. When, however, they further required him to give up the right of levying tonnage and poundage, the infatuated monarch again had recourse to a dissolution, which was immediately followed by the imprisonment of opposition leaders. Elliot was prosecuted in the Court of King's Bench for words spoken in Parliament, and the Judges as usual, servilely and profligately acquiesced, affirming the jurisdiction, and allowing a conviction—a judgment which was solemnly reversed by Writ of Error, as contrary to law, after the Restoration (1667). Other instances of judicial baseness were also exhibited on this occasion; but when the merciful King, the sacred Martyr, wished to have Felton put to the rack for the murder of his favourite, the Judges could not go quite so far; they declared torture to be illegal. A majority of seven to five soon after (1640) decided that the levying ship money was legal without consent of Parliament, in Hampden's case. But the Commons went a step further than their purpose required, as usually hap-

pens when in troublous times such strong measures are resorted to; they visited every word spoken or written in disparagement of their proceedings with the penalties of breach of privilege; thus at once declaring themselves above all censure, and founding their claim of absolute power upon a fiction of absolute infallibility. They even treated respectful petitions* as breaches of privilege.

The oppressions of the Star Chamber were multiplied at the same time. A greater number of punishments were inflicted, and severe ones, perfectly odious and revolting to the feelings of mankind, especially when compared with the station of the parties, and the nature of the charges, were more frequent than even under the Tudors. Thus, not only the pillory, but whipping, slitting the nose, and cutting off the ears, were ordinary inflictions; and fines, so heavy as sometimes to reach £12,000, were exacted, of which the greater portion always went to the King, thus forming an important item of his revenue. Of the kind of crimes thus visited we may form an estimate from this, that one person paid £8,000 for having said "Suffolk is base born;" and that Laud made Bishop Williams be condemned to pay the like sum, of which £3,000 went to himself as a compensation, for that Prelate having written a letter in which the Primate was turned into ridicule by a single expression. He was likewise imprisoned three years for the same jest, and for being so partial to it as to refuse apologizing to the indignant metropolitan. For some libel on the Church Leighton was whipped, pilloried, had his nose slit and his ears cut off, and was condemned to prison for life; Lilburn was whipped and pilloried; and Pryme suffered two several inflictions, the second of which cut off whatever of his ears the former had spared.

The discontent occasioned by such proceedings, and the impossibility of obtaining the necessary supplies by

* *Parl. Hist.*, 1147-1188.

all the violence to which he had had recourse, and with all the support he derived from an unprincipled bench of Judges, forced Charles to assemble Parliament, after an eleven years' intermission. It met in April, 1640, and, showing great moderation, united with as much firmness as had distinguished its predecessor, it was dissolved after it had sat three weeks. The increased rigour of his illegal exactions soon increased the prevailing discontent, in which his favour towards the religion of his Queen, and its professors, especially those in her service, entered largely; and after in vain seeking to evade the necessity he most feared, by assembling a great Council at York of all the Peers, he was obliged by their advice to summon that Parliament which in a short time overthrew his authority and brought him to the block.

The first proceedings of this celebrated assembly were admirable in every respect, and marked by equal firmness and moderation. They passed a bill to secure the calling of Parliaments every three years, and prevent any interruption for more than that period of their authority: the Lords to issue writs if the Crown refused; the Sheriffs if the Lords refused; the Electors if the Sheriffs refused. This triennial bill likewise prohibited the King from dissolving without its consent, until it had sitten fifty days. The judgment in Hampden's case was then reversed; all levies of customs, and generally all imports, without consent of Parliament, were declared illegal, and strictly forbidden; all pressing of soldiers, unless in case of actual invasion; and as the crowning work, without which neither Parliament nor people could be safe for an hour, the Star Chamber and high Commission Courts were for ever abolished, by depriving the Privy Council of all jurisdiction in criminal matters, and confining it to the more necessary operations of police, and commitment for trial by due course of law. The King submitted to pass all these important bills, but he interfered with

the debates upon them, and this was so far resented by the Parliament that no instance is known of that offence against privilege being repeated.

These were great and glorious achievements; and these must bound our praise of this renowned body. Their whole subsequent proceedings were framed, possibly intended, to alter the form of the Government, and not to protect it from attacks. The impeachment of Strafford alone of these violent acts leaves a doubt on the mind whether it were justified or not. The destroying him, and by attainder, was plainly without any excuse. The ruining him in the King's estimation, or rather the preventing his future employment by intimidating his master, was perhaps necessary from his talents, his courage, his influence with Charles, and the part he had since his apostacy openly and zealously taken against the people. His tyrannical and unconstitutional proceedings furnished a sufficient ground for convicting him of high crimes and misdemeanours. But the pretext that it was necessary to take his life because there was no other way of securing the people against so powerful an adversary, was exactly the reason which Henry VIII. would have given for destroying his victims. The manner of accomplishing his destruction was borrowed by the Parliament from the example of that tyrant; the right which they had to destroy him, if grounded on their fears of his power and talents, was no better than Henry's right to put any formidable opponent to death; and the shameful submission of Charles, contrary to every principle of duty and conscience, was exactly a counterpart of the subserviency of the Parliament to his despotic predecessor in passing his bills of attainder.*

The other acts of the Long Parliament are without excuse, and placed beyond any question. The Act to

* Mr Hallam falls into the great error here pointed out, in his remarks upon Strafford's case.

prevent a dissolution without their own consent was an open and audacious assumption of supreme power, not by the people, but by a number of individuals, who thus made themselves absolute, and established an oligarchy, rather than a democracy, in their own persons. It was passed with a truly revolutionary speed, being brought in upon the 5th of May, carried to the Lords on the 7th, and agreed to by them on the 8th; so that in three days the whole Constitution was changed, and the King's power became little more than nominal. The Bishops were then excluded from Parliament; and the King's assent to this was his last concession. What followed was done by main force, and on the eve of taking arms, or in the midst of that din which proverbially puts all law to silence.

The immediate causes of the rebellion were, *first*, the religious zeal, or rather fury, excited by the encouragement which the King and Queen gave to Popery, and which was greatly magnified, at least as concerned him. The alarm of the Protestants at the danger to their religion, not only drove many churchmen into the communion of the Puritans, but led the Parliament to the most preposterous assumption of privilege. Thus they treated as a question of privilege any alteration in the ceremonial of worship, declaring all "new fangled ceremonies" to be a breach of their undoubted privileges. This was, of course, levelled at Laud, whose tendency towards Popery closely resembled that of a powerful body of the clergy in our own times.—In the *second* place, a conspiracy was discovered of some leading persons in the King's party, to march the army to London and subdue the Parliament; the petition was even prepared, which the army numerously signed, praying to be heard by the Parliament; and Charles had the incredible folly to countersign it, but retracted before it could be acted upon, instead of keeping aloof from the movement until it could be successfully executed.—But in the *third* place, and which more than

all the rest hurried on matters to extremities, he took the insane step of entering in person the House of Commons, and claiming the surrender of five members, the leaders of the party opposed to him, but who had the whole Commons and nearly the whole Lords for their followers. He had the day before desired the Attorney-General to prosecute them and a popular Peer for high treason, the charge being grounded on their Parliamentary conduct, in which they had all the Parliament for their accomplices. Even Mr. Hume, the staunch apologist of Charles and all the Stuarts, treats this step as an indiscretion beyond "the fondest wish of his enemies;" as a course entered on "without concert, deliberation, or reflection;" as an act "the prudence of which nobody pretended to justify," (Chap. lv.) Lord Clarendon confesses that this unwarrantable and infatuated act alienated the generality of those who were beginning to judge more favourably of Charles, probably alarmed by the growing violence of the Parliamentary proceedings. Dr. Lingard, who repays the favour of the Stuarts towards his Church by extreme partiality for them, admits it to have been a proceeding equally blamed by his friends and his enemies.* That it led immediately to the vote which vested in Parlia-

* The extreme prejudice under which this able and respectable author writes is a great drawback to his work. His history is far more learnedly and carefully composed than any other of our country; and yet, owing to his partiality, it leaves unsupplied the blank admitted by all to have been left by Mr. Hume: for we meet in every part of his narrative with the apologist or the advocate of the Pope and Popery. So Romish a history could hardly have been supposed possible to have been written in this country, and by a person of the most respectable character. As for the Stuarts, Mr. Hume, with all his prepossessions, and his habitual "love of kings and queens," must be admitted to have been very far surpassed by Dr. Lingard. The former had too masculine an understanding to let Mary's conduct pass unreproved. The latter carries his partiality to the Romish Queen so far that he not only acquits her of all knowledge of Darnley's murder, but of all belief that Bothwell was an object of suspicion, and of all blame respecting his mock trial and scandalous escape; nay, he cannot even bring himself to censure the marriage itself, looks upon it as quite a becoming thing for a woman to marry a few weeks after her husband's violent death, and seems quite satisfied that a Queen can be

ment the nomination of the Militia officers,—in other words, the command of the army,—cannot be doubted; and this was the commencement of the Civil War.

It is wholly beside the design of this work to follow the history of the great events which that war produced, or to contemplate the extraordinary display both of civil and military genius by which it was marked. A revolution which unsettled the whole frame of the State, and changed in almost all particulars the established order of things, could not fail to force, as in a hotbed, the talents and the virtues, as well as the vices and the weaknesses, which peaceful times and regular government either nip in the bud, or stint in their growth, or cast into the shade, when they chance to attain maturity.* But it is equally certain that in England, as in France a century and a-half later, a vast majority of the people were averse to the change which overthrew the monarchy; that the republican party, utterly inconsiderable at first, was always a much smaller minority than in France; that the extremities to which the leaders went against the King found very few supporters among the people, and were disapproved by a majority of the Parliament itself, from which a military force in one day expelled two hundred of its members, leaving the minority in possession; and that the influence of the two most powerful motives which can affect the conduct of nations, religious fanaticism and terror, was required to make those violent proceedings be patiently borne. The hatred of the Church abuses in France supplied there the place of that fanaticism, and the terror was exercised in a much

married by force; but, worse than all, he appears absolutely to be the apologist of Bothwell himself, and gives an account of his latter end wholly different from all other writers.

* They who are fond of representing as revolutionary the changes operated in our Government by the measures of 1831 and 1832, should reflect that there is wholly wanting, among other things, this one indication of a revolution. Hardly any men of talents have, by that revolution, been cast up to the surface.

greater excess. But in both revolutions the success of a party was secured by similar means; and in both the indolence and timidity of the well-disposed enabled the enemies of the people to prevail. The same moral is to be drawn from both these sad tales alike. It teaches all men that he who permits injustice and cruelty to triumph, when by doing his duty to his neighbour he could defeat them, shares the guilt though he may not share the spoil; and that the risk of being overpowered in the struggle for right is not such an excuse for inaction as can satisfy any but the most callous feelings and the most easy conscience.

The abolition of Monarchy was complete. It was declared treason to give any one the title of King without Act of Parliament—the House of Lords, as well as the Crown, was set aside—and the supreme power, legislative as well as executive, remained vested in the House of Commons, now attended by less than a hundred members, and wholly under the influence of the army. A council of forty-one—three-fourths of whom were members of the House—was appointed for a year to preserve the peace, dispose of the forces, naval and military, and represent the country with foreign states. A new seal, representing the Commons, was made, and entrusted to three Commissioners; and an oath to be true to the Commonwealth was directed to be taken by all persons in office. Half the Judges took it; the others resigned. The former made it a condition that Parliament would engage to maintain the fundamental laws of the realm. To this the House agreed; and the Judges never seem to have reflected that the Kingly power runs through all the jurisprudence of England, from the foundation upwards. New writs were issued to fill up vacancies which had reduced the Commons to a seventh of their number, and 150 at length were found to compose the House; but it was seldom that fifty could be got to attend, and hardly ever 100. Five or six eminent loyalists were tried and

executed, but the reign of the Commonwealth was little stained with blood. Their puritanical rigour made them denounce severe penalties against offences which no penal law can ever well or safely reach; Acts were passed punishing incest and adultery with death, and fornication with three months' imprisonment—Acts, the severity of which, as might easily be foreseen, prevented their execution. But the public prayer for general reformation of the law was attentively listened to; and an important commencement was made of amendment in the system and in the practice of our jurisprudence. A full inquiry was instituted into financial abuses and frauds upon the revenue, especially in the management of forfeited estates. These must have been of importance, as in one year (1651) seventy individuals, chiefly of rank and fortune, were forfeited for their adherence to the King. The year after, previous to the fatal battle of Worcester, which extinguished the hopes of Charles II., his followers were also attainted; 71 first, and then 682 were thus punished; all, however, being suffered to redeem at one-third of their value. The Catholics were persecuted, but only one suffered death. The Presbyterians had been far worse persecutors than the Independents, insisting on uniformity of worship. But the Independents showed fully as much rapacity; and it was reckoned that the income of Catholics in the hands of sequestrators amounted to above £60,000 a-year, though only two-thirds of England were included in this calculation. The rigour of their measures was not confined to the rich and noble; their violence descended to artisans, peasants, and menial servants.

The Long Parliament had naturally become unpopular, both from its duration of eighteen years, from the expulsion of a large portion of its members, and from its subserviency to the army and their chiefs. Cromwell's usurpation, therefore, was acceptable to the nation; but he had little other hold over the

people than what their dislike of Parliament and the dread of his military power gave him. He collected about 120 men of puritanical and sanctified habits, chosen by himself from a greater number returned by different congregations, and to them he entrusted the whole government. This ghostly body (commonly called Barebones' Parliament), how ridiculous soever in many of its proceedings, showed no little wisdom in prosecuting several important reforms, and correcting some glaring abuses; it also showed some disposition towards independence in the exercise of the powers conferred upon it. This of course displeased Cromwell; and on dissolving the body, and taking upon him the executive government, under the title of Protector, as tendered to him by a party of its members, he proclaimed the Instrument of Government in forty-two articles, vesting the legislative power in the Protector and Parliament,—no dissolution of which could take place, without its own consent, in less than five months. The Protector had the command of the army and navy; the power of making peace and war, with his Council's consent; the power of appointing the great officers of State, with consent of Parliament; and the successors of the Protector were to be named by the Council. The Parliament consisted of 460 members, chosen by the larger boroughs, exercising their former rights of election, and in counties by persons possessed of £200 in any kind of property: 400 were for England, 30 for Scotland, and as many for Ireland. It met; and finding, after five months' trial, that the members were far from being very pliable to his wishes, he dissolved it, and alarmed by a royalist movement in the west, delivered over the kingdom to eleven Major-Generals for as many districts, who were commissioned to levy a tax of ten per cent., which he imposed on all royalists. He also continued a duty on merchandize beyond the time limited by law. Some refusing to pay this illegal impost were fined by the

collectors, and sued them for damages. The Judges showed their wonted subserviency and pusillanimity, and Cromwell sent to the Tower the counsel for one party who sued. He also erected a High Court of Justice, by which several of his adversaries were condemned to death, and suffered accordingly. The Government was now a military despotism, and it is certain that nothing but Cromwell's brilliant success in all his foreign expeditions, and the dread of the Stuart family being restored, could have maintained him on his usurped throne.

After an interval of about two years he was obliged to call another Parliament; the Scotch and Irish members were submissively obsequious; the English so little disposed to obedience that he previously examined the returns, and by an act of violence excluded about ninety of them on pretence of their immorality. No one was suffered to enter the House, guarded by his sentinels, but those who had a certificate from his Council. The result was an obsequious assembly, which addressed him to take the title of King, and agreed to many amendments on the Instrument of government. He refused the Crown, as is well known; but the amendments of the Instrument gave him the power of naming his successor, and of naming an Upper House of not more than seventy, nor less than forty members. In virtue of this sixty-two members of the Lower were summoned to the Upper House. The removal of his principal supporters from the Commons weakened his influence in that House, and he was soon obliged to dissolve this Parliament,—the fourth that he had so dismissed, and the last he ever called.

It has sometimes been considered by historians that the first form of government under the Protector, that of the Instrument, was republican; and the second, under the Petition and Advice, was monarchical; and Mr. Hallam is of this opinion. But except in the power of naming his successor, and the institution of

the Upper House, the first was really as monarchical as the second. The Protector's death, and his son Richard's incapacity to hold his office, led, after an interval of eighteen months, during which the Government was at one time in the hands of a Council of general officers, to the restoration of Charles II., without any security whatever being taken for his constitutionally governing the kingdom, beyond the effect which his father's fate and his own sufferings might be expected to produce upon his mind.

CHAPTER XVI.

THE GOVERNMENT OF ENGLAND UNDER THE STUARTS—THE REVOLUTION.

The history of the Constitution from the Restoration to the Revolution, although usually viewed as divided into two portions,—the proceedings of Charles II. and those of James II.,—is in fact properly to be considered as one and the same; the course of events being uninterrupted, the proceedings of all parties being the same, and the conduct of the brothers only varying in the accelerated pace with which the more honest and bigoted of the two hurried matters to a crisis. The only real difference in the two reigns is, indeed, to be found in the personal characters of those Princes; the one indolent, careless, unprincipled, loving his ease rather than anxious about power, unless as it might secure him from interference with his pleasures, or save him from the equally ungrateful interruptions of business; not at all envying others their freedom so he might only enjoy his own;—the other a stern ruler, jealous of his prerogative from religious as well as political principle; a furious bigot from conviction; little averse to labour, and fearing no risk in the pursuit of his object; ever ready to sacrifice a temporal to an eternal crown; and though affecting much regard for his word, yet unscrupulous of breaking it when its strict observance stood in the way of his predominant passion. Though in religion Charles had gradually become a Romanist, he never was prepared to avow his conversion, or to make any sacrifice for his faith; his religious principles hanging almost as loosely about him as his moral. But James, though a rigid

devotee, confined his self-restraint to matters of faith and the promotion of his Church—having led at all times the same licentious life with which his brother and the rest of the Cavaliers, combining party feeling and personal indulgence, had debauched the English morals and outraged the feelings of the puritanical classes, even after their restoration to power.

It not only little suited Charles's habits to risk what he termed "going again on his travels," in order to battle for Prerogative and Popery, as James would have had him do; but he even would himself have preferred ruling by Parliaments as the easier course to pursue, could he only have found them reasonably tractable. He had no mind, as he told Lord Essex, to sit like a Turk and order men to be bow-stringed; but then he "would not have a set of fellows spying and inquiring into all his proceedings,"—and of some laws which he found established he openly avowed his detestation, declaring, for example, that he never would suffer any Parliament to be assembled under the famous Triennial Act of 1641. This was accordingly repealed. Still he tried how far he could go on amicably with such assemblies; and it was only when he found they refused him money, and would inquire into the public conduct of his Ministers, that he threw himself into the arms of France, made his power and influence wholly subservient to the profligate ambition of Louis XIV., received regular supplies of money from him to evade the necessity of meeting his people's representatives, bartered for this price at once the honour and the policy of the country, and entered into a shameless conspiracy both against the liberties of Protestant Europe and the free Constitution of his own kingdom. It is manifest that had the English Patriots in 1670 been apprised of his proceedings, the Revolution never ought to have been delayed an hour. The calling in of William at that time would have been on every principle equally justifiable; and the expul-

sion of the restored family would have been an act still more necessary for saving both the liberties of Englishmen and the independence of their country; for that which James's proceedings never even threatened, was absolutely sacrificed by Charles—the national security as against France.

For a long time doubts were entertained by many, and affected by some, of Charles's criminality; nor were these wholly removed until the publication of a secret treaty entered into with Louis XIV. in 1669, made all further denial of the conspiracy impossible. He thereby stipulated for a regular pension of £200,000 a-year, equal in value to half a million at the present day, and 6,000 men. In return for these means of both governing without Parliament and overpowering all resistance from his subjects, he became party to a plan of partition upon a scale not exceeded by the northern powers in the case of Poland a century later, and to whom indeed these infamous transactions may well be considered as having served for a model. France was to seize the larger portion of the United Provinces, while England should have the greater part of Zealand, with Ostend, Minorca, and part of the Spanish provinces in South America; a Bourbon prince occupying the Spanish throne, and abandoning part of the Spanish empire as the price of his quiet possession. It is worthy of observation, as fixing upon Louis XIV. still more incontestably the invention of the Partitioning system, that he had twice, three years before, entered into a similar scheme with the Emperor for dividing the Spanish dominions. The inequality of the conditions had made the Emperor abandon this notable project; he perceived plainly enough that while Louis was to occupy the Peninsula and the Dutch provinces at his ease, the Emperor would have no part of the spoil that he did not win by force of arms.

It was certainly fortunate for this country that the

suspicions raised in Louis's mind by the vacillating conduct and apparent bad faith of Charles, prevented the prompt performance of the conditions thus entered into. Had a well-appointed French army entered England, while abundant supplies of money supported the tyrant, he had only to keep on gratifying the Established Church with means of oppression towards the Dissenters, and to remain wholly inactive in his support of the Catholics, and his work of usurpation was complete. The abominable acts excluding all Non-conformists from corporations, and preventing them from ever coming within five miles of any corporate town, had won prodigious favour in the eyes of the clergy; and Charles had no such bigoted zeal for the religion which he secretly had embraced, or rather which he was in the course of adopting, as to risk "going upon his travels again," by giving it open and offensive protection. Add to this, that he had shown a truly regal facility of abandoning his oldest and ablest servants, when Clarendon was impeached, suffering him to be declared guilty of treasons which he never had committed, because he timidly or prudently fled from an accusation of high misdemeanors of which he was undeniably guilty. His sending persons to remote and even foreign prisons, where they lingered without a trial for years until his fall; his accession to the French Alliance, and his procuring for Charles pecuniary supplies to preclude the necessity of meeting Parliament—were crimes of a deep dye, how little soever they could give his profligate and ungrateful master a pretext for leaving him to his fate. His detestable conduct on the occasion of his daughter's marriage, when he besought the King to refuse his consent, and declared he had rather she were treated as a strumpet, or put to death for a conspiracy against the prerogative, than that the Crown were sullied by such an alliance, though it be an offence incomparably less heinous to the State, has, more than all his other

crimes, fixed upon his memory the just scorn of all good men in after ages.

In carrying on his Government two things were to be remarked of Charles, in both of which he differed extremely from his brother, and accordingly prevented the Revolution from taking place in his time, towards which, however, all things manifestly tended. He showed much address and temper in avoiding difficulties which he seldom if ever met in front or endeavoured by force to surmount; and he displayed no obstinacy nor even firmness in the pursuit of objects, which so careless and self-indulgent a nature little regarded. Thus, although it cannot be supposed that he gave implicit credit to the Popish Plot, and most likely disbelieved it altogether, he yet contrived to keep a certain neutrality through the whole of the excitement into which it threw the nation, and was able to take advantage of the reaction which succeeded when the wretches who had deceived the people so successfully, pushed their attempts a step too far, and accused those connected with the Royal Family. But his want of steadiness was apparent when, after issuing his declaration suspending the penal laws on the assumption of a prerogative to legislate absolutely in ecclesiastical matters, he was fain to withdraw it upon the anxious remonstrance of the Commons, alarmed, perhaps, more for their religion than their liberties. The extreme unpopularity of the Duke of York on account of his religion had given rise to a bill for excluding him from the succession. Charles used all his influence against it, and succeeded in throwing it out when it came to the House of Lords. The Duke himself was fully resolved, had it passed, to have tried even the desperate extremity of civil war rather than submit to the law; declaring to Barillon, the French Ambassador, that there remained no other means but this of restoring the Royal authority in England. Yet so bent upon taking security against his bigotry were

even those who chiefly opposed the Exclusion Bill, like Halifax, that they framed as a substitute for it another bill which entirely changed the form of the Government, providing that, on a Catholic succeeding, the veto upon bills should cease, all civil and military offices be bestowed by Parliament, and a Committee of both Houses sit during the prorogation. It may further be cited as a proof of the excess to which Anti-Catholic alarm was carried, that, early in 1680, the Commons passed a unanimous resolution, declaring the Fire of London to have been the work of Papists, with a design of destroying the Protestant religion; and excluding from a seat every papist who should accept any office under the Crown.

In the whole history of human weakness there is no parallel to be found for the sudden change which speedily after came over the nation and its representatives. Whether the extremities to which they had been carried during the plot, or the violence which had been shown against the Duke of York, or the natural alternations of fickle and ill-informed men composing the multitude of all nations, or the shameful zeal displayed by the Established Church in vituperating the conduct of the late Parliament, or a part of all these circumstances, be the reason, certain is the fact, that hardly had the session closed when from one end of the island to the other there burst a cry loud and continual against all that the Parliament had done; and an universal disposition was disclosed to suffer whatever assaults upon liberty the prerogative of the Crown might make. The corporation of London, threatened with disfranchisement by a *quo warranto* issued against its charter, and aware of the habitual subserviency of the Judges, was glad to accept any terms that were offered, and submitted absolutely to the dictation of the Crown. The same base and pernicious example was followed in the other corporate towns. The late King's death in the bosom of the Romish Church, and the ostenta-

tious display of his religion by James going openly to mass in Royal state, failed to open men's eyes and alarm their religious fears. He ventured early upon calling a Parliament, and a revenue of £2,000,000 equal to £5,000,000 at this day, was settled on him for life, with £700,000 a-year for supporting a standing army. An address on behalf of the Penal Laws was altered on a suggestion that its expressions might give offence to the King. A bill passed one House at least, and that the people's House of Parliament, declaring it high treason to make any motion for altering the order of succession—the very house which a few years before had passed a bill to exclude the reigning monarch for ever, and bestow the Crown as if he had been naturally dead. It seemed a most superfluous plan which the profligate Sunderland had formed to dissolve the Parliament during the King's life, and trust to supplies from France in case any extraordinary occasion for them should arise. James, so lately the object of all men's dread and aversion, was now extolled for his courage, his adherence to his promises, his patriotic services to the country, his patience under the late persecution, which had forced him to reside abroad; so that he became now, to use Lord Lonsdale's expression, "the very darling of all men."

Meanwhile, notwithstanding his promise to rule constitutionally, and his pluming himself on being a man of his word, he began his reign by declaring permanent the customs which had been voted for a fixed time. He assumed the power of dispensing with the penal laws, and issued a "Declaration for Liberty of Conscience" on that ground, taking care all the while to gratify at once his own monarchical dislike of the Nonconformists and the Church's prejudice against that body, by joining in severely persecuting them. In Scotland, where the Crown's prerogative was always more restricted than in England, he suspended the

penal laws, as he stated, "by virtue of his sovereign authority, prerogative royal, and absolute power, to be obeyed without reserve by all subjects;" and for these acts the whole country, both counties and towns, poured in their warmest addresses of thanks. The gratitude of the Spanish mob, actuated by their priests and fired with superstition, was never in our own day more eagerly displayed for the restored blessings of despotic government than was that of the English people, in 1686 and 1687, for the arbitrary rule of James II.

Now, above all, was exhibited the base sycophancy of the lawyers, rendered more disgusting by the learned garb in which it clothed the vile language of crouching slaves; their subserviency the more glaring as it was the more pernicious and the more infamous in the more elevated positions of the profession. Now were seen the Benchers of the Middle Temple first hailing with delight the earliest act of the tyrant's reign, his levying money without consent of Parliament,—for which wholesome exercise of the prerogative those sages of the law humbly and heartily tendered him their thanks. Again, the raptures of the same vile body knew no bounds when James, himself spurning all bounds, assumed the full dispensing and suspending powers. They averred that the Royal prerogative is the very life of the law, gratefully thanked him for asserting it, declared it to be given by God, and beyond the power of any human tribunal or authority to limit, and vowed to defend with their lives and their fortunes the grand truth, *a Deo rex—a rege lex.* Then, too, were seen the whole twelve judges, save only one, declaring the right of the King to dispense with penal statutes, most solemnly made for the purpose of restraining his power; a Pemberton wresting the rules of evidence, to the sacrifice of innocent persons hateful to the Court; a Jefferies campaigning in the north against all corporate rights, in the west against all dis-

senters from the doctrines favoured by the Prince, and causing streams of the purest and most innocent blood in the land to dye its furrows, that he might do his profligate employer's butchery, pave the way for absolute monarchy, help the overthrow of the national religion, and meanwhile provide convicts to be spared by redeeming their lives or their exile with money to meet the cravings of a profligate and insatiable Court. A Parliament, however, seemed still wanting to give the Catholics their establishment in the form of law; and to prepare for this, Regulators of Corporations were commissioned to examine all their titles and all their acts, and to new model their structure under the threat, amounting to inevitable certainty, of judicial sentence if they resisted.

Happily the moonstricken Prince had gone a step too far. He had done in a month or two what, if a year or two had been consumed in doing, might have been unresisted. He had expelled the members of one college for being Protestants, named a Catholic principal of another, and prosecuted seven Prelates for representing against his Declaration appointed to be read in all Churches. The Church had mainly been the cause of his excesses. The declarations of the University of Oxford some years back, against all freedom of discussion and in favour of absolute government, followed up by their slavish submission at his accession, and the zeal with which the clergy had everywhere taken his part, running down all his opponents, and especially the Protestant Parliament last held in his brother's reign, had not unnaturally induced him to believe that he might rely on their neutrality, if not on their help, in all his designs. In truth, he had persuaded himself that there was no substantial difference between his faith and their's; for he had been entirely converted to Romanism by reading the controversial writings of the English Divines in the school of Laud; and it must be admitted that, like a

certain sect of the Anglican clergy in our own day, the bounds which separated that school from Romanism were very difficult to descry. However, he reckoned on their adherence in vain. Suddenly Oxford led the way in deserting him, as she had led the way in seducing him. The communication had now been opened with the Prince of Orange. James saw that he must fight for his crown; and though he prepared himself by the measure of drafting a great number of Irishmen into his army, men prepared to fight for any cause or any person, the precaution was taken too late; the Bishops were acquitted, even the Judges now venturing to do their duty; the army refused to quit the Church; the clergy rallied in defence of their benefices, and their pulpits, and their faith; the country declared generally against the King, and for the Prince. A convention first, then a Parliament, after much subtle discussion, declared the throne vacant, and setting aside James's children, as well as himself, except the two Princesses, Mary and Anne, who had gone over to his enemies, settled the succession to the Crown upon William and upon them; and it was afterwards further limited to the descendants of James I.'s daughter, married to the Elector Palatine. This Revolutionary arrangement, grounded entirely upon the will of the people in a state of resistance to their hereditary rulers, is the whole foundation of the title by which the House of Brunswick now enjoys the crown. Cavils have sometimes been attempted, as if there had been no actual resistance in 1689; but they are only worthy of those antiquaries who deny a conquest in 1066, and read conqueror, acquirer. There had been arms taken in almost all parts of the country; but especially and on a large scale in Yorkshire, Notts, and Cheshire. There was a foreign army in the country, for no other purpose than to put down all attempts on the King's side; his troops for the most part joined the Prince; and by resistance to James he was deposed.

The form of words used, out of regard to tender consciences and legal niceties, in the Acts of the Convention offering the vacant throne, and of the Parliament offering the sovereignty for William and Mary's acceptance, is wholly immaterial. The Abdication was known and felt by every one to be constructive, not actual; James was well understood to have returned to London as King, and never by any act or word to have resigned the Royal authority which he claimed by hereditary title. But the people had rejected him; and their representatives held him to have vacated the throne, because he had been guilty of acts which justified them in deposing him. Moreover, suppose he had formally abdicated, he could not prejudice his son's title to succeed upon the vacancy which his resignation made. But the same power—the will and voice of the people—which had pronounced the throne vacant in spite of James, set aside the title of his son; called to the succession William, who stood five or six off, and by the course of nature could not easily have hoped to succeed; and then made the Crown hereditary in the daughters of James, living his son, and afterwards limited it to a remote branch, excluding that son's issue.

Nothing can be more clear, therefore, than that the whole proceeding was revolutionary; that the change was effected by the Resistance of the people to their sovereign; that his assent was neither obtained nor asked, nor in any way regarded; and that the supreme power having been forcibly seized by the nation, was used to install a new chief magistrate in the throne. It must, however, be carefully kept in mind, that the constitution thus preserved was not in any material respect altered; and that even in the manner of providing for its endurance as little departure as possible was made from the established system, including the order of succession.

CHAPTER XVII.

THE CONSTITUTION OF ENGLAND.

The National Resistance was not only, in point of Historical fact, the cause of the Revolutionary settlement, it was the main foundation of that settlement; the structure of the government was made to rest upon the people's Right of Resistance as upon its corner-stone; and it is of incalculable importance that this never should be lost sight of. But it is of equal importance that we should ever bear in mind how essential to the preservation of the Constitution, thus established and secured, this principle of Resistance is; how necessary both for the governors and the governed it ever must be to regard the recourse to that extremity as always possible—an extremity, no doubt, and to be cautiously embraced as such, but still a remedy within the people's reach; a protection to which they can and will resort as often as their rulers make such a recourse necessary for self-defence.

The whole history of the Constitution, which we have been occupied in tracing from the earliest ages, abounds with proofs how easily absolute power may be exercised, and the rights of the people best secured by law be trampled upon, while the theory of a free Government remains unaltered; and all the institutions framed for the control of the executive government, and all the laws designed for the protection of the subject, continue as entire as at the moment they were first founded by the struggles of the people, and cemented by their labour or their blood. The thirty renewals of Magna Charta—the constant and almost

unresisted invasions of the exclusive right of Parliament to levy taxes by the Plantagenet Princes of the House of York—the base subserviency of the Parliament to the vindictive measures of parties, alternately successful, during the troublous times of the Lancaster line—the yet more vile submission of the same body to the first Tudors—their suffering arbitrary power to regain its pitch after it had been extirpated in the seventeenth century—the frightful lesson of distrust in Parliaments, and in all institutions and all laws, taught by the ease with which Charles II. governed almost without control, at the very period fixed upon by our best writers as that of the Constitution's greatest theoretical perfection—and, above all, the very narrow escape which this country had of absolute Monarchy, by the happy accident of James II. choosing to assail the religion of the people before he had destroyed their liberty, and making the Church his enemy, instead of using it as his willing and potent ally against all civil liberty—these are such passages in the history of our government as may well teach us to distrust all mere Statutory securities; to remember that Judges, Parliaments, and Ministers, as well as Kings, are frail men, the sport of sordid propensities, or vain fears, or factious passions; and that the people never can be safe without a constant determination to resist unto the death as often as their rights are invaded.

The main security which our institutions afford, and that which will always render a recourse to the right of resistance less needful, must ever consist in the pure constitution of the Parliament—the extended basis of our popular representation. This is the great improvement which it has received since the Revolution. As long as the House of Commons continued to be chosen by a small portion of the community, and to be thus influenced by the feelings and the interests of that limited class only, the Government resembled

more an Aristocracy, or at least, an Aristocratic Monarchy, than a Government mixed of the three pure kinds; little security was afforded for constant and equal regard to the good of all classes; and little security was provided against such a combination between the Crown and the Oligarchy as might entirely destroy even the name of a free Constitution. The increased influence of the Crown from large establishments, the result of the burdens left by expensive wars and of extended foreign conquests, seemed capable of undermining all the safeguards of popular liberty, and threatened to obliterate all the remains of free institutions, as soon as some bold and politic Prince should arise equal to the task of turning such an unhappy state of things to his own account. In 1831 and 1832 the Parliamentary constitution was placed upon a wider and a more secure basis; and although somewhat yet remains to be accomplished before we can justly affirm that all classes are duly represented in Parliament, assuredly we are no longer exposed to the same risks of seeing our liberties destroyed, and the same hazard of having to protect ourselves by resistance; nor can any one now deny that the democratic principle enters largely into the frame of our mixed monarchy. This great change is much more than sufficient to counterbalance all the increase of influence that has been acquired by the Crown since the Revolution, including the vexations which unavoidably attend the administration of our fiscal laws for the collection and protection of a vast revenue, and the creation of a numerous and important body, always averse to struggle even under the worst oppressions, and always the sure ally of power—I mean the vast and wealthy body of public creditors, whose security is bound up with the existing order of things.

The great virtue of the Constitution of England is the purity in which it recognizes and establishes the fundamental principle of all mixed governments—that

the supreme power of the State being vested in several bodies, the consent of each is required to the performance of any legislative act; and that no change can be made in the laws, nor any addition to them, nor any act done affecting the lives, liberties, or property of the people, without the full and deliberate assent of each of the ruling powers. The ruling powers are three—the Sovereign, the Lords, and the Commons: of whom the Lords represent themselves only, unless in so far as the Prelates may be supposed to represent the Clergy; and the Scotch Peers to represent, by election for the parliament, and the Irish, by election for life, the peerages of Scotland and Ireland respectively; the Commons represent their constituents, by whom they are for each parliament elected.

If it should seem an exception to the fundamental principle now laid down, that the Crown has the power of making peace and war, and of entering into treaties with foreign states—operations by which the welfare of the subject may be most materially affected—it is equally true that no war can possibly be continued without the full support of both Houses of Parliament; and that no peace concluded, or treaty made, can be binding, so as to affect any interests of the people, without their subsequent approval in Parliament. The Sovereign, therefore, never can enter into any war, or pursue any negociation, without a positive certainty that the Parliament will assent to it and support the necessary operations, whether of hostility or of commercial regulations; and thus the only effect of this prerogative is to give due vigour and authority to the action of the Government in its intercourse with foreign powers and its care of the national defence.

It is, however, a more serious infringement of the fundamental principle if either of the three branches assumes, under any pretence, a power of acting without the concurrence of the other two, and without the sanction of any known general law to which the obe-

dience of the people may be required. The several branches of the system have each at different times endeavoured to exceed this limited and balanced power, and to exercise alone a part of the supreme functions of government. The Crown long struggled with the Commons to be allowed the right of taxing; it assumed repeatedly the right to imprison individuals without bringing them to trial; it claimed the power of suspending laws or of dispensing with them at a much later period, and exercised this, at least in ecclesiastical matters, down to the period of the Revolution. The abandonment, or the prohibition by law, of these dangerous pretensions, was the main victory of the people, both in the seventeenth and eighteenth centuries; the freedom of the Constitution was deemed to consist chiefly of the restraint under which the Sovereign was thus effectually laid. But the two Houses of Parliament, and more especially the Commons, have laid claim to certain privileges by no means consistent with the mixed nature of the Constitution, and repugnant to the liberty of the subject.

The judicial power exercised by the Lords as a supreme Court of Judicature in all matters of law, whether civil or criminal, and a Court of general appeal in all equity suits, has never been deemed inconsistent with the liberties of the people. If indeed it were exercised, as by the letter of the Constitution it should be, by the whole body of the Peers, in like manner as their legislative and political functions are, great abuse must ensue, and wide-spreading oppression must be the consequence. But the Peers very wisely have in practice abandoned this right, and left their whole judicial business in the hands of some five or six of their number, professional lawyers, who have filled, or continue to fill, the highest judicial offices in the State. There have only been two instances of the Peers at large interfering in such questions for the last hundred years: only one within the memory of

the present generation, and that above fifty years ago.

Both Houses, however, claim to visit with severe punishment what are called contempts or breaches of their privileges,—the Commons by imprisonment during the session, the Lords by imprisonment for a time certain, and by fine. Nor would this be objected to if it were confined to cases of actual contempt and obstruction, as by refusal to obey their lawful orders issued in furtherance of the judicial proceedings of the Peers, or of the inquisitorial functions of the Commons, or of any matter without the compassing of which either House could not proceed to discharge its duties. No court, from the highest to the lowest, can exist for any useful purpose, if its proceedings may be interrupted by any unruly individual, or riotous mob, or if its members may with impunity be obstructed or threatened in the discharge of their duties; and it is absolutely necessary that such lawless conduct should be at once repressed by immediate punishment. But very different have been the powers of visiting contempts claimed by the two Houses, especially by the Commons' House of Parliament. They have punished summarily, as breaches of their privileges, acts which could in no way be construed into an obstruction of their functions, and which might most safely have been left to the ordinary visitation of the criminal law. We have in the course of the last two Chapters seen the latitude which they frequently assumed in classing whatever they disliked under the head of breach of privilege, and punishing it with extreme severity. In the time of James I., as we have seen (Chap. xvi.), the Commons ordered a person who was charged only with having spoken disrespectfully of the Palatine, then an object of popular favour, to be led ignominiously in procession on horseback, with his head towards the tail of the beast, to be whipped from London to Westminster, to pay a fine of £5,000, and to be imprisoned

for life; and all but the whipping was executed upon this unfortunate gentleman. In Charles I.'s time they habitually voted any act which displeased them a breach of their privileges. In order to reach an obnoxious individual, whatever he did was declared against their privileges; thus to reach Archbishop Laud all "new-fangled ceremonies in the Church service" were voted contempts of the House. The same inordinate assumption of power under the name of privilege was in the next reign not unfrequent. The persons of members' servants, too, were held as sacred as those of members themselves. Nay, down to a late period, the last year of George II.'s reign, there are instances of members preferring their complaint in questions of private right to the House, instead of trying the matter by actions at law; and of the House treating the assertion of adverse rights as breaches of its privileges, and punishing the parties accordingly. Even at this day a libel on the House is treated as a breach of its privileges, as if any possible injury or obstruction to its proceedings could arise from prosecuting this as the King prosecutes it, and as every other person in the realm prosecutes attacks on his character.

It is impossible to deny that this power assumed by the Houses of Parliament, and especially abused by the Lower House, is an infringement on the whole principles of the Constitution, and a great violation of all the ordinary rules which ought to regulate the administration of criminal justice. In the *first* place, the party wronged, or complaining of injury, not only institutes the trial without the intervention of a grand jury, but assumes to be the sole judge of the charge, to find the guilt, and to mete out the punishment.—*Secondly*, the proceeding is of the kind most abhorrent to our laws; for the party is called upon to confess or deny the charge, and if he refuse to criminate himself he is treated as guilty.—But *thirdly*, and chiefly, he is tried, not by a general law, previously promulgated,

and therefore well known to him whose duty it is to obey, but by an *ex post facto* law, a resolution passed by his accuser declaring the criminality of the act after it has been done. This appears to be quite intolerable. Any law, anyhow made, provided it be made calmly, and before the event occurs which it embraces, is far preferable to a law contrived and promulgated for the first time on the spur of the occasion, when the passions are heated by the offence done or alleged. If even an indifferent party, a court of justice, or a legislature, were to make the law by which the defence should, in one breath, be defined, and the accused convicted, the grievance would be intolerable of such an anomalous justice. But how incomparably worse is the justice of the party complaining, himself making the law by which his adversary is to be tried, and pronouncing the rule, and the conviction, and the punishment, at one and the same time? I say nothing of the manner in which this proceeding precludes the Royal prerogative of mercy; because possibly breach of privilege, whether actual or constructive, is a case which ought to be exempt from the protection of the Crown. But the other objections are quite sufficient to make all considerate persons—all who are not, like one great party in the State, carried away by an undistinguishing love of party supremacy, and disregard of all the rules that should regulate judicial proceedings—agree entirely with the very sound and judicious opinions on this important subject, expressed in the resolutions of the Lords on the Aylesbury case in the year 1701. They declared that "neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament; that the Commons, by their late commitment of certain persons for prosecuting an action at law, under pretence that it was a breach of their privileges, have assumed to themselves a legislative

power by pretending to attribute the force of law to their declaration, and have thereby, as far as in them lies, subjected the rights of Englishmen, and the freedom of their persons, to the arbitrary votes of the House of Commons."

In 1721 the Commons went yet farther, for they committed to Newgate the printer of a Jacobite paper, merely because it was a public libel, and without pretending even to declare it a breach of their privileges; so that, by the same rule, they might punish any person for any kind of misdemeanour, without judge or jury.

I sincerely wish that I could perceive in the more recent history of Parliament any disposition on the part of the Commons to recede from so untenable a pretension as the claim to declare at any time their privileges, and to add new chapters to their Criminal Code as new occasions arise. Not only did they commit Mr. Gale Jones to Newgate, on the flimsy and indeed ridiculous quibble that debating in a club a *question* concerning the parliamentary conduct of a member was in violation of the Bill of Rights, which forbids *questioning* in any court or place any member for his proceedings in Parliament (a provision plainly intended to prohibit all judicial proceedings or quasi-judicial proceedings against members for their parliamentary conduct);—not only did they send Sir Francis Burdett, and a few years after Mr. Hobhouse, to prison for libels published against them, which the ordinary process of the law reached, and would have been quite sufficient to punish;—but they afterwards assumed in 1836, and defended in 1837, the power of publishing whatever attacks on individuals they might think fit, and of protecting their agents from all responsibility, civil or criminal, for the act;—a power never in modern times pretended to be exercised by the Crown, whose servants are responsible for all acts done by its orders. Upon the same memorable occasion they adopted a resolution reported by a committee charged to inquire

into the matter, and in that resolution they asserted their unqualified right at all times to create new privileges, and denounce new acts as a breach of those privileges. So that as the law of Parliament now stands the two Houses are invested each with a separate and uncontrollable power of making laws as occasion may require, of grinding, as it were, a little new law as they want it, and to suit the particular cases which arise; nor is any limit but their own discretion assigned to this pretended right. It may be quite necessary to give them the right of removing, and of summarily preventing all obstructions; quite right to let them visit, and severely visit, all misrepresentations in public of their proceedings, which are only made publicly known by sufferance; but to give them anything like the power of several legislation and jurisdiction claimed by both Houses, must be an infringement of the Mixed Constitution of the English Government. It is in vain to deny the origin of this claim, and the motive for preferring it. They dare not trust to the ordinary administration of the criminal law; they dare not go before an impartial judge and indifferent jury; they dread the consequences of leaving the law to take its course; and therefore they must needs take it into their own hands, and at once make themselves party prosecuting, grand jury, petty jury, judge, and even lawgiver, by one sentence forming the law, promulgating it, prosecuting for its violation, convicting the accused under it, he being their adversary, and sentencing him to suffer for the wrong done, or alleged to be done by him, to themselves.

Let us now shortly consider in what the Constitution of England consists, how its structure is preserved, and how its functions are performed, having generally surveyed the principles on which it rests, the sacred right of resistance, the separation and entire independence of its component parts, and the admission of the People

as well as the Prince and the Peers to an equal share in its powers and prerogatives.

The whole Executive Power is lodged in the Sovereign; all the appointments to offices in the army and navy; all movements and disposition of those forces; all negociation and treaty; the power of making war, and restoring peace; the power to form or to break alliances; all nomination to offices, whether held for life or during pleasure; all superintendence over the administration of the civil and the criminal law; all confirmation or remission of sentences; all disbursements of the sums voted by Parliament; all are in the absolute and exclusive possession of the Crown. An ample revenue is allotted for the support of the Sovereign's dignity, not only in a becoming but in a splendid manner, and his family share in due proportion the same liberal provision. To which is added a sum, formerly unlimited, of late years restricted to £1,200 a-year, for the reward of merit, by way of gratuity or pension.

Such are the powers and prerogatives of the Crown; but they are necessarily subject to important limitations in their exercise. Thus the Sovereign can choose whom he pleases for his ministers, dismiss them when he pleases, and appoint whom he pleases to succeed them. But then if the Houses of Parliament refuse their confidence to the persons thus named, or require the return to office of those so removed, the Sovereign cannot avoid yielding, else they have the undoubted power of stopping the whole course of Government. So, too, if war is declared, or peace concluded, contrary to the opinion of Parliament, the Sovereign has no means of conducting either operation, and his own inclination must be abandoned. We have before seen at large how there is often a compromise effected between the conflicting branches of the Government; and how, to avoid a collision, each giving up a portion of its demands, the result of the combined move-

ment which the machine of the State pursues, is one partaking of the impulse which each has given to it.

If it cannot on any account be affirmed that the Sovereign has full and independent powers of action, so it cannot any more be affirmed that he is without power, and very considerable power, in the State. If he can find any eight or ten men in whom he reposes confidence, who are willing to serve him, and whom the Houses will not reject, he has the choice of those to whom the administration of affairs shall be confided. When he has obtained a ministry, on many important points they are likely to consult his opinion and wishes rather than bring matters to a collision with him. Many modifications of the measures of Parliament are likely to be adopted rather than come to a rupture with him. The vast patronage at the disposal of the Crown, and the great revenue allotted to meet the Sovereign's personal expenses and those of his family, are a source of individual influence, which must arm him with great direct power. His opinions, if strongly entertained, like those of George III. on the American war and Catholic question—his wishes and feelings, if deeply entertained—are thus certain to exert a real influence upon the conduct of public affairs, and with even the most conflicting sentiments of the people and the Peers, secure a sensible weight to his views in the ultimate result. This is the spirit of the Constitution, which wills that the individual Monarch should not be a mere cipher, but a substantive part of the political system; and wills it as a check on the other branches of the system.

Of all the Sovereign's attributes none is more important than his independent and hereditary title; nor can a greater inroad be made upon the fundamental principles of the Constitution than the bringing this into any doubt or any jeopardy. Hence, in the event of his infancy, illness, or other incapacity, it is a serious defect in the system that no general law has provided

for supplying his place; because this leaves the question to be discussed and debated each time that the Royal authority fails, and in the midst of all the passions sure to be engendered by the adherents of contending parties and the advocates of conflicting opinions. There can be no manner of doubt that Mr. Fox's opinions in 1788 were far more in accordance than those of Mr. Pitt with the spirit of a constitution, which abhors all approach to election in the appointment of the Chief Magistrate. Yet that precedent, followed as it was by Mr. Perceval's ministry in 1811, in both instances, from the mere personal views of the parties and their hostility to the heir apparent, has established it as the rule of the Constitution, that in the event of the Sovereign's incapacity the two Houses of Parliament shall always legislate to choose the Regent and define his powers, as well as to provide for the custody of the King's person. This is a complete anomaly in our form of government, and it perpetuates the risk of the worst mischiefs arising as often as the incapacity occurs, by providing that the whole of the subject most exciting to all classes shall be discussed during the greatest heats which that excitement can kindle. Of the same Parliament which in its wisdom has declared itself the best judge in its own cause, and has resolved that the law of its privileges, the measure of its prerogative, shall be taken from occasional decisions made for the purpose of each case, it may be pronounced worthy and in exact consistency to refuse settling by a general law the manner of supplying any defects in the Royal authority, of preserving the prerogative of the Crown, and to leave the rule for special, and partial, and inflamed consideration as often as the incapacity occurs. As it has dealt with Parliamentary privilege so has it dealt with Royal prerogative, according to the factious views of the hour, and with no regard for the well-being of the Constitution.

The most important check upon the Royal authority is the necessity of yearly meeting Parliament, and of having recourse to it for the means of carrying on the government. The power of the sword is really only given for a year to the Sovereign. The only means which he possesses of keeping the army and the navy together, and enforcing the strict discipline required, flow from an act passed yearly, and for a year each time. There are many branches of the revenue which in like manner are only granted for a year—in fact all save that portion which is mortgaged to the public creditor. If, then, a King were to retain the troops on foot without a Mutiny Bill, and to levy the revenue not voted by Parliament, not only would the soldiery be released from obedience to their commanders, not only would the people be released from their allegiance, and justified in resisting the Crown, but the courts of law would refuse to aid the ministers by either suffering soldiers to be tried by courts martial, or requiring the subjects to pay their taxes. No soldier needs fear punishment for his disobedience, no person needs pay any of the taxes beyond those mortgaged to pay the interest of the national debt. Thus it becomes absolutely impossible for the Crown to govern without assembling a Parliament, or to govern without a general good understanding with the Parliament so assembled. Besides, whoever should remain in any office of trust under the Crown while illegal attempts were making, much more, whoever should join in making them, would as soon as Parliament met be impeached by one House and tried by the other; and although the Crown might pardon him, it could not prevent his trial and conviction.

Over the Parliament, thus essential to the administration of public affairs, the Sovereign no doubt has great influence. He can at any moment dissolve it, provided the Mutiny Bill is passed and the necessary supplies are granted; and thus, by appealing to the

nation at large, he can defeat any factious cabal which an oligarchy not faithfully representing the body of the people might contrive for enslaving the Prince. There is even some risk of this power being abused, by the Royal influence being first employed to excite a popular clamour against particular men or particular measures, and then advantage being taken of such delusions in an immediate general election. The shortening of the duration of Parliaments affords the best security against this hazard; because, if the Parliament has only been assembled during a short period of time, the Sovereign is less likely to encounter another general election.

The Lords, who form the upper and permanent branch of the legislature, may be considered as representing not merely themselves, but also their powerful families and immediate connections, and in some sort as representing all the greater landowners in the country. We have shown how great a tendency the habits and the interests, and even the prejudices of this important assembly have to make it a conservative body, every ready to fling its weight into the scale of the existing Constitution, and to prevent matters coming to extremities between the Crown and the people. Its veto upon all the measures that pass the Commons, the weight derived from its judicial functions, its general superiority in the capacity and learning required for excelling in debate, its more calm deliberation on all questions, unbiassed by mob clamour, its more statesmanlike views of both foreign and domestic policy, give the Upper House an extraordinary influence on all questions of national concernment. But to these sources of weight, the elements of the Natural Aristocracy, must be added the influence and indeed the direct power bestowed by vast possessions, as well as illustrious rank; and against this can only be set the popular connection of the other House, and its tenacious adherence to certain privileges with respect to the

Lords. I allude particularly to the exclusion of the latter from the originating of any measure of supply, and from all alterations upon any financial measure sent up from the Lower House. Although the Lords have never abandoned their claim to originate and to alter money bills as well as the Commons, yet in practice they never assert the right; and we may therefore take it, that by the practice of our Constitution the Commons alone can begin any measure of supply, and that the Lords have no power to alter it as sent up to them, but must either accept it wholly or wholly reject it.

It seems quite clear that this exclusive right of the Commons is wholly useless to them, while it greatly tends to impede public business, by loading the Commons with Bills which might be considered in the Lords while they have nothing else to do, and occasioning Bills to be thrown out in their last stages, and then introduced in the Commons and reconstructed, in order to meet objections taken in the Lords. That the Commons gain nothing whatever by this pretension is clear; and nothing can be more absurd than citing the case of the Upper House's judicial functions as a parallel one; for in that instance the Commons cannot interfere at all, the whole matter beginning and ending in the Lords; whereas the assent of the Lords to a money-clause is just as necessary as to any other part of a Bill. The claim is grounded on mere violent and factious excitement; on mere romantic and poetical declamation; on views consisting of exaggeration, of confounding things like as if they were identical; or on substituting one idea for another; or on a determination to act unreasonably and according to fancies and figures of speech, not solid arguments. It must be remarked, too, that the Commons, after treating this exclusive privilege as of paramount importance, as the safeguard of all its other privileges, have suffered it to be broken in upon once and again; as when it with-

drew from the absurd pretence that a prohibition being enforced by a pecuniary penalty could not be touched by the Lords, because it was a money-clause.

Another point on which the Commons claim the exclusive right to begin measures, relates to the election of its members. They hold that the House cannot part with this to any other body; and further, they will not suffer any Bill touching it to begin in the Lords. Yet nothing is more certain than that, as far back as 1770, they abandoned this exclusive right altogether, transferring the whole judicature touching elections from themselves to a Committee, authorized by an Act of Parliament, to which of course the assent of both King and Lords was absolutely necessary. It is equally certain that this and the subsequent statutory amendments of the Election Law have proved among the most useful, as they were among the most necessary improvements in the practice of the Constitution. Nor does any one now doubt that a further delegation of the judicial power in dealing with contested elections, such a delegation as should transfer it wholly from the Committees of the House to independent and impartial Judges, would be a still more valuable improvement in the constitution of Parliament.

No reasonable doubt can exist that the most perfect arrangement of the mutual rights of the two Houses would be that of entire equality; and that neither ought to have the exclusive right to originate or frame any law. In discussing certain measures there would naturally be a greater weight attached to one House than the other, a greater deference shown to its opinions, and a proportionable reluctance to reject its propositions. Thus the Commons, as representing the numbers of the community, as well as a portion of its wealth, would naturally be listened and deferred to upon all questions of public burdens, whether on the property or the labour of the people, and on all

questions touching the elections of their members. The Lords would, in like manner, be more listened and deferred to on matters affecting the judicial system and the privileges of Peerage. Nor can it be reasonably doubted that this mutual deference would be far more surely and far more readily accorded by both Houses, if neither persisted in setting up claims so fanciful and so preposterous as those which we have been considering—claims inconsistent in themselves, and wholly repugnant to the fundamental principles of a Mixed Government.

The Crown is the fountain of honour, and can alone confer any rank or precedence. The unlimited power belongs to it of creating Peers; and of these no less than twenty-six, the Prelates, enjoy their Peerage only for life. The power, indeed, exists of creating temporal Peers also for life; but it has never been exercised further than by calling up the eldest sons of Peers,—an operation which adds to the numbers of the House only during the lives of individuals. Twenty-eight Irish Peers sit by election for life, and sixteen Scotch during the parliament. The only restriction upon the power of creation refers to the Irish Peerage. No addition can be made to it in a greater proportion than that of one to every three peerages that become extinct.

This prerogative has upon several occasions been exercised to influence the proceedings in Parliament. Lord Oxford carried a question of importance in the Lords by a sudden creation of twelve peers, in the reign of Queen Anne. Mr. Pitt greatly extended the influence of the Crown in the House of Commons, and diminished the importance of that body, by transferring many of his adherents among the landed gentlemen to the Upper House. In recent times the Government, of which I formed a part, backed by a large majority of the Commons and of the People out of doors, carried the Reform Bill through the Lords

by the power which his late Majesty had conferred upon us of an unlimited creation of Peers at any stage of the measure. It was fortunate for the Constitution that the patriotism of the Peers, acting under the sage counsels of the Duke of Wellington, prevented us from having recourse to a measure so full of peril. I have always regarded it as the greatest escape which I ever made in the whole course of my public life. But were I called upon to name any measure on which the whole of a powerful party were most unanimously bent, nay, which attracted the warmest support of nearly the whole people, I should point at once to the measure of a large creation of Peers in 1831 and 1832. Nothing could possibly be more thoughtless than the view which they took of this important question. They never reflected for a moment upon the chance of their soon after differing with Lord Grey and myself, a thing which, however, speedily happened—never considered what must be the inevitable consequence of a difference between ourselves and the Commons—never took the trouble to ask what must happen if the Peers, thus become our partizans, should be found at variance with both King, Commons, and People—never stopped to foresee that, in order to defeat our oligarchy, a new and still larger creation must be required—and never opened their eyes to the inevitable ruin of the Constitution by the necessity thus imposed of adding eighty or a hundred to the Lords each time that the ministry was changed. I have seldom met with one person, of all the loud clamourers for a large creation of Peers, who did not admit that he was wrong when these things were calmly and plainly stated to him—these consequences set before his eyes. But I have often since asked myself the question, Whether or not, if no secession had taken place, and the Peers had persisted in really opposing the most important provisions of the Bill, we should have had recourse to the perilous creation?

Wellnigh thirty years have now rolled over my head since the crisis of 1832: I speak very calmly on this, as on every political question whatever; and I cannot, with any confidence, answer it in the affirmative. When I went to Windsor with Lord Grey I had a list of eighty creations, framed upon the principle of making the least possible permanent addition to our House, and to the Aristocracy, by calling up Peers' eldest sons; by choosing men without any families; by taking Scotch and Irish Peers. I had a strong feeling of the necessity of the case in the very peculiar circumstances we were placed in. But such was my deep sense of the dreadful consequences of the act, that I much question whether I should not have preferred running the risk of confusion that attended the loss of the Bill as it then stood; and I have a strong impression on my mind that my illustrious friend would have more than met me half-way in the determination to face that risk (and, of course, to face the clamours of the people, which would have cost us little) rather than expose the Constitution to so imminent a hazard of subversion. Had we taken this course I feel quite assured of the patriotism that would have helped us from the most distinguished of our political antagonists; and I have a firm belief that a large measure of reform would have been obtained by compromise—a measure which, however hateful at the moment to thoughtless, reckless men, become really more eager about the mode of obtaining it than about the object itself, would afterwards have proved satisfactory to all.—My opinion of Lord Grey's extreme repugnance to the course upon which we felt we were forced, has been more than confirmed by his letters since he read the above passage.

We have now considered the House of Lords in its constitution and functions, composed of Spiritual and of Temporal Peers. The Prelates sit, and have always had seats, in that House as Barons, each hold

ing his see by the tenure of free-barony. But the Clergy, as a separate body in the State, had an assembly of their own, called the *Convocation*, summoned by the Archbishop's writ under the directions of the Crown. There was one for the province of York, which never was of any importance, and one for that of Canterbury. The Convocation consisted of the Bishops, who formed the Upper House; and the Deans and Archdeacons, proxies for the Chapters, and two for each diocese, elected by the Parochial Clergy; these formed the Lower House. The Convocation was hardly ever consulted except in granting a supply, and enacting Ecclesiastical Canons. In the reign of Henry VIII. and Elizabeth, it was consulted on questions touching the religion of the State. Thus, in 1533, it approved the King's Supremacy then enacted by law; and in 1562 it confirmed the Articles of Religion. However, by the Statutes made in Henry VIII. and Elizabeth's reign, and above all by the Act of Uniformity, in Charles II.'s time, the power of making canons without the King's leave was first taken from the Convocation; the Thirty-nine Articles, and the articles respecting residence, became fixed and incapable of alteration except by the Legislature; and the doctrine gradually became established in the Courts of Law, that no canons whatever, unless confirmed by Parliament, could bind the Laity. Even the subsidies which the Convocation granted were confirmed by Parliament, and thus were assumed to be ineffectual of themselves. At length, in 1664, the taxation of the Clergy in Convocation ceased altogether, since which time all classes of the people have been taxed in common by the Parliament. At the time of the Revolution, 1688, the Jacobites, for factious purposes, with the restless Atterbury at their head, before his flight and attainder, endeavoured to claim for the Convocation a right to meddle with Church questions; and some countenance was even given to

those agitators by the Commons referring the form of the Liturgy for their consideration. The answer to all their arguments was the King's absolute power of adjourning and proroguing them, which he was free to exercise at all times, because he no longer had occasion for their votes to obtain supplies. In the early part of Queen Anne's reign the body was suffered to sit more than it had done for many years. It became notorious for violence of faction; it was soon, however, defeated by a prorogation; and since 1717 it has never sat for the transaction of any business whatever. Summoned as a matter of form at the beginning of each new Parliament, it is immediately prorogued as soon as it carries up an address to the Throne. The existence, therefore, of the Convocation is now nominal merely.*

The Crown has the absolute power of appointing all the Judges, with the three exceptions of the Judges in the Ecclesiastical Courts, who are named by the Archbishops and Bishops; of the Vice-Chancellors of the Universities, who exercise a local jurisdiction over the students and tradesmen in the University towns; and of the Borough Magistrates, who exercise local jurisdiction by their Charters of Incorporation.† It is greatly to be desired that such anomalies, especially the appointment of the Dean of the Arches and Judge of the Consistorial Court of London by the Archbishop of Canterbury and Bishop of London respectively, should cease; and I must, in justice to these Right

* It is singular that Mr. Hallam, in his able and learned work, should have fallen into the vulgar and hurtful error of considering the Church as a corporation. "It is the first corporation in the realm," says he, Chap. xvi.; again, "the clergy have an influence which no other corporation enjoys," *ib.* The Church is not even synonymous with the clergy—it is all the faithful in communion with the Church, according to the definition in the Thirty-nine Articles themselves; it is also a collection of corporations clerical, for each chapter is a corporation aggregate, and each parson is a corporation sole. The consequences of Mr. Hallam's notion are most hurtful in considering questions of Church reform.

† The lord of the manor of Havering-atte-Bower, in Essex, has the right of appointing Justices of the peace within that manor.

Reverend Prelates, observe that they were willing, in 1833, to give up this patronage if Parliament could have been induced to make a proper provision for those high legal offices. It must likewise be added that the patronage has never been abused, the most eminent practitioners in the Courts Christian being invariably chosen, as they ought, to fill such important places.

Though named by the Crown, care is taken to make the common law Judges independent. Soon after the Revolution their places were made to continue during life or good behaviour; they are irremovable except by a joint address of the two Houses of Parliament; and as this only enables the Crown without compelling, each act of removal is like a statute, requiring the concurrence of the whole three branches of the Legislature. The power has never been exercised;* and at the accession of George III. the judicial independence was rendered complete by providing that the office should not be vacated on a demise of the Crown. The highest of all the Judges, though only clothed with a civil jurisdiction, the Lord Chancellor, holds his place during pleasure. But the analogy of the Common Law Bench has been followed in the case of all the other Equity Judges—both the Master of the Rolls, the Vice-Chancellors, and the Masters in Chancery, holding their offices during life and good behaviour. The Judicial Committee of the Privy Council is also placed in a somewhat anomalous position, although quite consistent with the fundamental principle which views the Sovereign as the authority appealed to in all Admiralty, all Consistorial, and all Colonial cases. The members of that High Court,

* About fifty years ago the House of Lords inquired into the conduct of Mr. Justice Fox, an Irish Judge, accused of partial and unbecoming conduct in his judicial office. The inquiry was of considerable duration, and what might have been the result we are left to conjecture; the learned Judge having resigned his office. Another Irish judge, Mr. Justice Johnstone, who had been convicted of a private libel, would also have been proceeded against had he not resigned.

therefore, though irremovable from their judicial stations out of the Council, may be removed from the Privy Council, and thus cease to form part of the Judicial Committee. It is, however, to be observed, that no emolument nor any rank is attached to the place; and further, that no Privy Councillor is ever removed without grave reason for his removal. Nevertheless, it would be more satisfactory if some means could be devised of making these important judicial functionaries wholly independent of the Crown in name, as they undoubtedly are in fact.

An additional security is taken for the pure appointment of Judges by the very proper practice now become established, of the Chancellor, who is in fact the Minister of Justice, appointing the Puisne Judges and the Chief Baron, without any communication with his colleagues: he first of all takes the King's pleasure upon the nomination. This excludes, generally speaking, all political interference; and it is greatly to be desired that the same high officer, and not the Secretary of State, should fill up the successive vacancies in the Scottish Bench. The important office of Justice of the Peace is conferred by the Chancellor, generally on the recommendation of the Lord Lieutenant, or rather the *Custos Rotulorum* in each county. But once put in the Commission of the Peace, it is the ordinary practice not to remove any Justice without a conviction in a Court of Criminal Judicature.

The purity of the Bench is still further guarded by the statutory provisions disabling the Judges from sitting in the House of Commons. The Master of the Rolls and the Consistorial Judges are still exceptions to this rule. The Vice-Chancellors and the new Judges in Bankruptcy, the Judge of the Court of Admiralty and the Masters in Chancery, have all in later years been forbidden to sit in the Lower House. The chiefs are sometimes members of the House of

Lords; and this is in a certain degree necessary for the perfect exercise of its judicial functions. But the feeling is so strong and so general against Judges mingling in the strife of political party, that we rarely have any example of these great legal dignitaries taking part in the struggles of faction.

If the other parts of the political fabric which we have been surveying are well entitled to great admiration, surely there is no portion of it more worthy of an affectionate veneration than the Judicial system. It is by very far the most pure of any that ever existed among men; its purity in modern times is not only beyond impeachment, but beyond all question. In the utmost violence of faction, in the wildest storms of popular discontent, when the Crown, the Church, the Peers, the Commons, were assailed with the most unmeasured violence, for the last century and upwards no whisper has been heard against the spotless purity of the ermine; or, if heard for an instant, it has been forthwith drowned in the indignant voice of reprobation from all parties, and has only served to destroy the credit of the reckless slanderer who emitted it.*

The possession of such a system is invaluable to any nation; but in a free constitution, which requires large power to be lodged in the irresponsible hands of the people, it is absolutely essential to the existence of order in union with liberty. The Judicial power, pure and unsullied, calmly exercised amidst the uproar of contending parties by men removed above all contamination of faction, all participation in either its fury or its delusions, held alike independent of the Crown, the Parliament, and the multitude, and only to be shaken by the misconduct of those who wield it—forms a mighty zone which girds our social pyramid round about, connecting the loftier and narrower with the

* The shallow, violent, and unprincipled Junius never certainly recovered his ignorant assault on Lord Mansfield; that and his vile calumnies against the Duke of Bedford deserved equal reprobation.

humbler and broader regions of the structure, binding the whole together, and repressing alike the encroachments and the petulance of any of its parts. When Montesquieu invented his epigram, so often cited since, that the fate of the British Constitution would be sealed whenever the Legislature became more corrupt than the Constituents, he overlooked a topic more fruitful of sound and valuable truth, if not easily lending itself to glittering figure; he might better have pronounced the Constitution eternal while the Judicial portion of it remained entire.

We have now contemplated the Structure of the British Constitution; and we may cast our eyes for a moment upon the rights which it secures to the people, and the advantages it gives to the administration of their affairs. This we shall best do by considering those privileges which in less free countries are withheld from the people, and those facilities which in more popular Constitutions are found wanting to the Government.

By the choice of their representatives—by the power vested in the great landowners and other high dignitaries of the country—by the constant transaction of all public business in Parliament—by the unbroken publicity given to all Parliamentary discussions—the people, both of the higher and the middle ranks, have a real voice in the management of their own affairs; a real control over the conduct of their rulers; and, indeed, a great weight in the selection of the public servants. It is to be lamented that the working-classes, especially skilled artisans, have not, generally speaking, their share in the administration of affairs; and this might safely, and indeed beneficially, be entrusted to them. But as far as regards their rights and liberties they have the full protection of the Constitution. The meanest person in the country cannot be oppressed

without his wrongs becoming known in Parliament and to the whole community, even if the unhappy expense and complication still involving all legal proceedings should prevent him from having the full benefit of the Judicial system. This is one of the prime distinctions of England; that the Houses of Parliament, beside transacting the regular public business of the nation, are ever open to hear the petitions of the people, and the grievances of individuals; nor can the most insignificant member of either stand up in his place to prefer a complaint of such wrongs from the meanest subject of the Crown, without having a patient and even favourable audience. It is inconceivable what a confidence this inspires in all good men, and what a terror it strikes into those who would vex or oppress them.

It is needless to enumerate the important checks on Royal authority and Ministerial abuse which this Constitution provides. The people cannot be taxed to the amount of a farthing without the consent of the whole Parliament; there cannot be raised one man to serve in the Army, and but for the barbarous practice still adhered to, though very rarely used, of impressment, there could not be raised a man to equip the Navy, without the sanction of the same three powers; nay, as no war can be carried on without that concurrence, impressment, how harsh and clumsy a method soever of recruiting, may be strictly said to depend on the will of Parliament. Above all, for every act done by the Crown there must be a responsible adviser and responsible agents; so that all Ministers, from the highest officers of State down to the most humble instrument of Government, are liable to be both sued at law by any one whom they oppress, and impeached by Parliament for their evil deeds.

The right of Public Meetings to consider State affairs is possessed in an almost unlimited extent by this people. It is only restricted by law when it

exceeds all fair, useful, and legal bounds, and is made the means of intimidating the constituted authorities, terrifying the peaceable and well-disposed, and preparing the forces and the approach of rebellion.

The right of Printing and Publishing is subject to no further restriction than that of attending public meetings. No previous license is required either for putting forth a book or carrying on a journal; men are only called upon to afford the means of discovering their persons, in case they should pervert the press to the purposes of private and personal malice, or should make it an engine for exciting to insurrection and other crimes. It is to be lamented that the law in this respect is still defective, by withholding the right to prove the truth in prosecutions for public libel; and by not making a distinction between the author and the publisher, so as to favour the declaration of all writers' names and discourage anonymous publication. The leave to prove the truth in all cases, whether of public or private prosecution, should be confined to the real author alone.

The security of personal liberty is not only made complete by the Courts being open to any parties who have been unlawfully arrested, but by the severe penalty inflicted on all the Judges who refuse a writ of Habeas Corpus. It is the only instance known in the law of any country, of an action being allowed to be brought against any Judge for his judicial conduct. For oppression and corruption of other kinds, our Judges may be removed by the joint address of the two Houses, or they may be impeached by the one House and tried by the other. But for withholding, even for an hour, this remedial writ—the great security of personal liberty—they may be sued as common wrongdoers.

Let us now for a moment consider how far these privileges are made consistent with a sufficient vigour and unity in the executive's administration of affairs.

It must be admitted that the more popular constitution of the United States is exceedingly inferior in this important particular to that of England.

The Government cannot be carried on with us for any length of time, unless the ministers of the day have the support of a decided Majority in both Houses of Parliament. An attempt, attended with most mischievous consequences, was made some years ago to govern without such a majority. It led to so great public inconvenience, and was attended with so much discomfort and discredit to those who made it, that we may safely conclude the first experiment of this kind will also be the last. Hence the Government can always reckon on a general support of its measures; and can both carry on hostilities, if unhappily this recourse should be unavoidable, form alliances, and enter into negociations with sufficient confidence. Extravagant grants of money will not be obtained; unjust or impolitic measures will not be supported; but the Government which flies not in the face of public opinion, may be well assured of receiving the sanction of Parliament to all its important measures.

The large revenue placed at the Sovereign's disposal, makes him in a great measure independent in all ordinary transactions. He is not thereby enabled to govern without Parliament; but he is not reduced to the condition of a cipher, a pageant, or a dependent. He has influence enough to make his opinions and his inclinations felt in all the operations of the State.

The participation of the people of the upper and middle classes in all the affairs of State, the complete publicity given to all the measures of Government and of Parliament, and the full discussion out of doors which they undergo, knit the governors and the governed closely together, and enable the former to call forth all the resources of the country. See the vast armies at sea and on shore which our scanty population has at different times maintained! Mark the endless

variety of our settlements in all the most remote quarters of the globe! Above all, reckon the hundreds of millions which have been levied within the last hundred and fifty years from the people, and levied with hardly a remonstrance!—and then confess that for producing a strong government there is nothing like a popular constitution—that no despot, be he ever so absolute, has any engine of taxation that can match a Parliament! If it be said that the American Government can as well call forth the resources of the people, I have very great doubt if the national representatives, and especially the President towards the end of his first three years, would inflict a heavy excise or a grinding income-tax upon the people, as our Parliament has so often done; and I have no doubt at all that such an infliction would very speedily lead to a termination of hostilities, without any very great nicety about the terms of the peace. The English people are so ruled, that if once war is entered into, there is quite sufficient resistance from the Government and the Peers to an importunate desire of peace which might put the interests of the State in jeopardy, or fix a stain upon the national fame.

The three principal defects in the structure of the House of Commons, and which might be removed, though it is hardly possible to remove altogether the greater evil of bribery, are the too great numbers of the House, the lopping off all close or nomination boroughs, and the substituting in their place some two or three score of small towns, the inevitable scenes of corruption.

1. The number of 658 is preposterously large. Though seldom above five-sixths attend, yet the meetings are far too numerous for calm discussion, and even for orderly demeanour. The number of speakers, too, protracts indefinitely the debates, and obstructs all business; so that, the whole session being spent on a few subjects, chiefly of a party kind, towards the end

of it, when men are exhausted, and when no considerable numbers remain in attendance, the most important measures pass without any consideration; and oftentimes some of this description are thrown out by the obstinate opposition of a few men, who profit by the period of the expected prorogation, in order to threaten delay, and thus cause useful bills to be given up. The Local Courts Bill, the Irish *nullum tempus* Bill, and others, were put off for a year by this unworthy species of warfare in the session 1842; and some measures which did pass, as the Imprisonment for Debt Bill, and the Bankruptcy Court Bill, were greatly mutilated. Party has seldom been productive of a worse evil than its throwing out one of the most valuable improvements in the Reform Bill of 1831,—that measure in its original shape having reduced the numbers of the Commons from 658 to 500.

2. The want of close boroughs, or some substitute for them, is an undeniable evil, and greatly obstructs the course of public business. However opposed these boroughs may be to constitutional principle, there being no means of placing great Government functionaries in the House of Commons is a serious evil. I more than once adverted to this in 1831 and 1832, when the Reform Bill was before the Lords. I agreed with the Duke of Wellington, who foresaw serious difficulty in carrying on the national affairs in such a Parliament as was proposed, unless, indeed we adopted the French plan of allowing the Ministers to speak in the two Houses, or at least in one of them, without seats and voices. Soon after I had a practical illustration of my argument, which confirmed these apprehensions. The Attorney-General was thrown out of a popular place by a cry which the Dissenters raised on some temporary matter, and he remained excluded the whole session, when the accident of a Scotch Judge making a vacancy on that Bench removed the Lord Advocate,

and the Attorney-General succeeded to his seat. Many important measures for the amendment of the Law were thus postponed for a whole year. But it may at any time happen that a Chancellor of the Exchequer, for conscientiously performing his duty by propounding an unpopular tax, or a Crown lawyer by repressing smuggling, or prosecuting sedition, shall find no popular constituency ready to choose them for their members, and thus the whole Government may be paralyzed.

3. The small boroughs of 200 to 400 voters are multiplied by the late Reform, and this is anything rather than an improvement on the elective system. Those places are unavoidably the haunts of bribery, hotbeds of every species of corruption. They fall into the hands of some jobbing attorneys, who traffic in them under the specious pretext of being paid their long bills.

If we endeavour to prevent bribery altogether, we may fail. But if we would much lessen its amount, what can be more obvious than the remedy of dividing the country into electoral districts, as France is? It is certain that bribery is confined to the towns, and to those, generally speaking, of a moderate size; that in hardly any of the very large ones does it prevail at all; that in none of the counties is it known. The right course, it should seem, is to choose the members, not by towns and by counties, but by districts composed of town and country together. Nor can there be any valid objection to thus blending the town with the country. Nay, were there even an objection, it must be a very formidable one to counterbalance the mighty benefit of putting down the pest of corruption which now threatens our national morals, as well as the purity of our Parliamentary system and the existence of our free Constitution; nay, which makes many good men, in balancing the advantages of a free and an absolute government, hesitate which to prefer, while they find

that a popular Constitution can only be purchased by the ruin of all morals.

We have now been contemplating the English Constitution in its structure and in its operation during ordinary times. But its admirers commend, and in some sort justly commend, its powers of adaptation to existing circumstances. Thus the most important rights have occasionally been suspended; or have been subjected to great restraints, almost amounting to total suspension. The right of public meeting was at an end during the greater part of the war which ended at the peace of Amiens. It was afterwards suspended for a few months in 1820. On these occasions no one denied that circumstances might require and so justify this restriction upon the right of meeting; the only question raised was upon the amount of the danger which was said to threaten the Government—an amount which I and others contended did not then justify resorting to so extreme a course.

The same remark applies to the suspension of the Habeas Corpus Act, as it is incorrectly termed; but that Act* only enforced and improved the subject's common law remedy, by giving it in vacation time, by extending the power of issuing the writ to all judges, by subjecting to heavy penalties those who withheld it, by prohibiting imprisonment beyond the seas, and by providing that all gaols should be delivered of prisoners at each assizes or sessions. The measure adopted frequently in William III.'s reign, again in George I.'s, and afterwards in George III.'s, was a power conferred on the Government of detaining and imprisoning persons suspected of treasonable and seditious designs, without bringing them to trial. This is a far worse measure at all times than the restriction of public meetings; but the exercise of the power is at least under some check; for a Bill of Indemnity is

* 31 Car. II., c. 2.

always required to secure the Government which has used such power of imprisonment; and as this bill must be carried through after the alarm has passed away, possibly when a new ministry is in office, they who have occasion for it are exposed to considerable risk if they have at all abused the power temporarily bestowed. I have conversed with ministers who had been parties to such proceedings; and I have invariably found in them a very natural, may I add also, a very wholesome, aversion to the whole plan.

The restraints upon Aliens during the last war may be ranged under the same head of extraordinary remedies. Nothing could be more unconstitutional, nothing more liable to abuse; and, accordingly, we have more than once had occasion to note the cases of grievous oppression to which the powers of the Alien Act were occasionally perverted.

In discoursing upon the frame of our Government, I have frequently used the term *constitutional;* notwithstanding the disfavour in which it is held by political reasoners of the Bentham school. They regard it as a gross absurdity, and as the cant language of the "factions," whom they hate. They say that the word has either no meaning at all, or it means everything and anything. A thing is unconstitutional, say they, which any one for any reason chooses to dislike. With all deference to these reasoners, the word has a perfectly intelligible meaning, and signifies that which it is always most important to regard with due attention. Many things that are not prohibited by the law, nay, that cannot be prohibited without also prohibiting things which ought to be permitted, are nevertheless reprehensible, and reprehensible because contrary to the spirit of the Constitution. Thus the Sovereign of England is allowed by law, like any other person, to amass as much money as he pleases by his savings, or by entering into speculations at home and

abroad. He might accumulate a treasure of fifty millions as easily as his brother of Holland lately did one of five; and he would thus, beside his Parliamentary income, and without coming to Parliament for a revenue, have an income of his own equal to two or three millions a-year. This would be an operation perfectly lawful and perfectly unconstitutional; and the minister who should sanction it would be justly liable to severe censure accordingly.

So we speak with perfect correctness of a law which is proposed being unconstitutional, if it sins against the genius and spirit of our free Government; as, for example, against the separation of the executive from the legislative and judicial functions. A bill passed into a statute which should permanently prohibit public meetings, without consent of the Government, would be as valid and binding a law as the Great Charter, or the Act of Settlement; but a more unconstitutional law could not well be devised. So a law giving the soldiers or the militia the power of choosing their officers, or a law withdrawing the military wholly from the jurisdiction of the Courts of Law, would be as binding and valid as the yearly Mutiny Act. But it would violate most grievously the whole spirit of our Constitution. In like manner letting the people choose their Judges, whether of the Courts of Westminster, or Justices of the Peace, would be as unconstitutional a law as letting the Crown name the juries in all civil and criminal cases. *

* It is unnecessary to observe that the authorities mainly to be consulted by such as would well study the Constitution of England and its History, are the Statute Book and the Parliamentary Writs; the decisions of our Courts of Justice; and the text writers upon our Jurisprudence. Next to those are the Debates in Parliament, since they have been printed. But there are excellent helps to this study in the works of learned authors professedly treating of the subject. Those of Blackstone, with the political writings of Locke, and the controversial ones of Brady and his adversaries, may be named among the older ones. Of late years Mr. Hallam and Lord John Russell have both made very valuable contributions to the learning of this most important subject. But their

Hitherto the Structure of the Government has alone been considered, and not the Functions. But there are three of these, and the most important, which create classes of men that materially affect the structure. These are, the Religious instruction of the people, the administration of Justice, and the national Defence. The body of the Clergy maintained by the State owes its existence to the first of these functions; the Judicial body is created by the second; the Army by the third. A very imperfect view would therefore be given of the Constitution if we did not enter fully into these several functions and their results.

treatises, however valuable, have one great defect in common—they begin with the Tudors. Now, it is quite undeniable that the foundations of our Constitution were laid many centuries before the fifteenth. Nor can any one hope thoroughly to comprehend it who has not gone back to the earliest times. I have never been able to understand why those able and learned authors have both begun with Henry VII. If, in discussing the Constitution of France under the old Monarchy, we are obliged to trace it from the earlier times, and instead of going back to Louis XIII., we go even to the kings of the first race as a matter of course, examine the successive steps by which the States-General and Provincial were first convened, and afterwards disused, and by which the Parliaments rose to an importance they never lost, surely it is still more necessary to trace the History of the English Constitution from the foundation of that structure which has never been destroyed or impaired, but always been fortified and improved; to examine, for instance, the origin and growth of our Parliament, which continues the Legislature of the Realm at this day, as we have examined the origin and growth of the French States, which had long before the Revolution ceased to exist at all.

Among the writers who have thrown any light upon this subject is not certainly to be mentioned M. La Croix. His superficial and inaccurate work is still worse upon the English than upon the other constitutions. A sample of the learning which he brings to bear upon it may be given; and it will suffice to show that, at any rate, some novelty is to be found in his pages. "No son," says he, "can succeed to his father's estate without the written permission of the Archbishop of Canterbury, who derives immense revenues from this relic of the feudal law."—ii., 293. "The Lord Chancellor has the superintendence of all hospitals, and is protector of all paupers. To him application is also made to have an interpretation of the true spirit of the law."—Ib. 296. "In the villages the lords of the place, formerly called barons, have police courts for regulating sales and transfers."—Ib. 287. "The justices of peace are in some sort the delegates (sub-délégués) of the sheriff."—Ib. 296.

CHAPTER XVIII.

ECCLESIASTICAL ESTABLISHMENTS.

A SYSTEM of religious instruction, endowed and patronized by law, with a preference given to its teachers over the teachers of all other forms of belief, —in other words, a Religious Establishment seems incompatible with a democracy. Where all the people are equal, and no privileged order is recognized, it seems impossible to give a preference by law to the teachers of one class of believers, however numerous these may be compared with all other classes of believers. In matters of a temporal kind, men may differ widely, some approving one doctrine, some another. But were the State to appoint teachers of one of these disputed systems of science, or of morals, or of legislation, and give them an endowment withheld from the teachers of other systems, no material injury would be done to the feelings or the comfort of any class, and the Government would be perfectly justified in preferring the teachers of a system tending to support the peculiar policy of the State. It is otherwise with respect to religious instruction. The happiness of men and their most anxious feelings are so deeply interested in their religious tenets, that any preference given by the State to the teaching of religious doctrines which they sincerely believe to be erroneous, proves excessively galling to them; and the same persons who could well bear to pay taxes which should go to the propagation of a physical, or even of a moral theory, deemed by them to be erroneous, would feel seriously aggrieved in paying their contributions towards propagating a religious doctrine which they

believe to be false—not to mention that although a Government may have some legitimate interest in the dissemination of moral or political opinions favourable to the policy of the Constitution, no Government can have any but an unlawful and sinister object in view by seeking the support of any system of religion, or forming a political alliance with its professors.

But there is another reason why no Democratic Government can support a National Religion, at least in the modern sense of the term. That, in all Christian countries, means the endowment of a class set apart from the rest of the community, and forming a peculiar body, a sacred order of men, who hold their functions for life. Even if these men are chosen by the freest election of the people, and removable at the people's pleasure, they are still an order of men whose influence is personal, and who are unconnected with the Government. This is not consistent with the Democratic scheme. Their being an order of men in choosing whom whole classes of the people are unqualified to join, renders their existence still more repugnant to the democratic principle. But it is hardly possible to have an Established Religion, the professors of which are not to hold their situations for life. A greater curse to the peace of a country and the happiness of its society than a priesthood dependent upon the breath of popular favour at every instant, cannot be imagined. Yet the existence of a class endowed by the State, of men possessing great personal weight, and nevertheless unconnected with either the Government or with any temporal concerns, and holding their places for life, is wholly repugnant to Democracy. The judges being appointed for life, is only rendered compatible with purely popular Government, by the intermixture of popular influence with their functions, through the appeal to the legislature and through the office of jurors. A clerical order of great influence, paid for life, and subject to no appeal

nor to any control, is wholly inconsistent with pure democracy; as much so as an order of knighthood or of nobility.

If it be said that some such plan as is adopted in several of the American Commonwealths would reconcile a State religion with a Democracy—namely, obliging every one to pay his tax to the State, but the State giving it over to the minister, of whose sect the contributor is a member—the answer is, that this may by some be said to constitute no Religious Establishment, because no preference is given to one faith over another. It is only a mode of raising funds for religious instruction; a mode, too, which the advocates of pure Democracy might object to as compelling every man to choose his sect.

We are thus led to inquire whether this impossibility of having an Established Religion in a Democracy be a virtue or a vice of that system; and this raises the question respecting the virtues and vices of Religious Establishments.

The objections to them are extremely manifest; but three of these it may be enough to state, because they seem to comprise all the others.

In the *first* place, it is a serious grievance to any person that he should be compelled to support a religion which he conscientiously disapproves, and this whatever be the form of the government under which he lives. Men are far more sensitive upon religious differences than upon any other differences, or indeed upon almost any other subject. We in vain try to persuade them that the points upon which they dissent from their neighbours are extremely insignificant compared with those upon which all are agreed. On the contrary, the less the distance which separates two sects, the greater seems generally to be the force that repels them from one another. In vain we try to remind them how much better it is that the bulk of the people, especially the lower orders, should be

taught some religion, and kept in some moral restraint by the discipline of some sacred functionary, than that they should go without any instruction or discipline at all. The answer ever at hand is, that such subjects are too sacred to admit of compromise, and that nothing can justify helping to propagate religious errors. In short, experience proves that this is a subject on which the bulk of men feel, and do not reason.

In the *second* place, although religious instruction be the motive of supporting an establishment, the civil magistrate always contrives to gain from that establishment secular support. This is both hurtful to the constitution by introducing a disturbing force, which always acts in favour of one party in the State, and it is hurtful to the interests of religion itself by making its teachers political instead of merely religious men, subjecting their doctrines and their conduct to secular influences. "Every idea (says Dr. Paley) of making the Church an engine, or even an ally of the State, converting it into a means of strengthening or of diffusing influence, serves only to debase the institution, and to introduce into it numerous corruptions and abuses."*

In the *third* place, the establishment of one religious class tends to the restraint of freedom, both in speech and thought, to intolerant practices, and to obstructing the progress of general improvement. Not only religious discussion is checked, but power and influence is gradually obtained by the predominant sect, and the civil magistrate is induced to extend its influence and to enforce the exclusion of other sects, beyond the mere preference given by means of the endowment. The various institutions to the benefit of which members of the Church alone are admitted—the many laws at different times made in all countries to put down dissent—the opposition so often given to useful changes

* *Moral and Political Philosophy*, Book vi., Chap. x.

by the privileged body—are all strong illustrations of this proposition.

It is commonly objected as a further evil of an establishment, that it imposes upon certain classes of the community a burden from which others are exempt—the dissenter having to support his pastor, while the churchman is provided with religious instruction for nothing; and if, instead of an endowment in land, or tithes, or both, the State Church is supported by taxes, then the dissenter pays a double tribute. The only reason for not enumerating this among the objections to an Established Church is, that to a certain degree it may be supposed applicable to the purely voluntary system; for the dissenters pay if they choose, and the persons who do pay, suppose there is no establishment, pay by so much more than those who do not. Besides, if it be said that the churchmen benefit by the State clergy, so do the dissenters, both by the learning upon theological subjects, which is thus encouraged and diffused, and by the good effects of the clergy's teaching upon the common people. The three objections first stated are the real grounds for opposing the Establishment by the State of one system exclusively.

It would be vain to deny the weight of these objections to an Establishment; they are undoubtedly of a very serious kind; and daily experience everywhere bears testimony to their importance. Nevertheless, it seems that upon the whole there result greater mischiefs from having no establishment at all, and that the balance is sensibly in favour of such an institution. This arises from the very peculiar nature of the instruction which religious teachers seek to convey.

1. If the people were left to supply themselves with religious knowledge, and the moral instruction which always accompanies the communication of it, there can be no doubt that they would very often remain without it; at least the classes which most require it would be

the least apt to obtain it. For the very want of it implies an ignorance of its value and uses; and hence they who were without it, and to whom it is therefore the most needful, would be for that very reason the last to seek it. This has been so much felt in countries which by the nature of their government could have no State Church, that they have fallen upon the expedient already mentioned, of requiring each person to pay a church rate or tax, towards some one minister whom each might choose for himself,—a mode of providing for religious instruction which is liable to manifest objections. But unless some such contrivance be resorted to, this obvious injustice will always be done. They who are sensible and public spirited will pay for those that are not. Whoever chooses to save his money will be able to benefit by the churches which his more liberal neighbour supports. Even if he be not allowed to attend the service in these, he will profit by the improvement in the conduct of those who do; and this injustice and inequality is exactly one of the evils objected in another view to an establishment.—The compelling men to pay for the support of opinions which they do not hold, is another and the main objection; yet, as it is very possible that a person may agree with no one sect in the community, the case of such person falls within the scope of the objection.

2. If the people are to provide for the support of their own pastors, so must they select them also. The objection is quite as great to requiring men's profiting or endeavouring to profit by the ministrations of a State minister, as to requiring their support of a creed they disapprove. Then the office of religious instructor must be elective. Who can doubt the evils to which this must give rise—evils, above all, to religion itself? If any one quality is requisite in a pastor it is his authority with the flock; the teacher must therefore be independent of the hearer. If he holds his place from the congregation, his doctrine must be suited to

its palate; he must preach, not the word of God, but of man. He must submit to the caprices of the multitude and study popular arts. His character must be degraded far below the debasement of the political demagogue; inasmuch as he has sacrificed much higher things, stooped from a far greater height to reach the necessary pitch of degradation. He who has accommodated his sacred functions to the caprice of the multitude has done an impious act, and forfeited all claims upon the respect of rational men by losing his own. Even if the original choice is to be the people's only interference with their pastor, still the process is both unseemly and debasing. The arts of a popular candidate ought never to have a place in the habits of holy men; the pulpit, of all places, is no place for canvassing. Besides, if the people are split into parties respecting the choice of a minister, as they of course will be when that choice is left free, how are the defeated minority to profit by the ministrations of the man whose unfitness they have been proclaiming, and even been violent in proclaiming? The result must be, that on every election a secession of the defeated party to hear their own favourite will take place, and thus each congregation will be indefinitely split. However, we are making a groundless, a gratuitous assumption, when we suppose that the people's interference can be confined to the day of election; for a free and voluntary system, and the absence of all Establishment, presupposes that the pastors are to be provided with funds to support them by the voluntary contributions of their flocks. An endowment or a compulsory provision, leaving the choice in the people, is one form of a Religious Establishment; it is, in fact, the form in which the Scottish National Church was established for several years after the Revolution of 1688. When we speak of the people in any community being without a State Church, we mean that they shall not only elect, but maintain their religious teachers; and, accordingly,

one of the arguments often put forward by those who object to Establishments, is their tendency to make the minister careless and indolent in discharging his duties. It is, indeed, the reason mainly relied upon, next to that of the violence done to conscience; and even this may also be urged against the kind of establishment now under discussion; for a pastor chosen for life, and for life endowed, may change his doctrine, may become heterodox as well as indifferent; and then men are compulsorily providing funds for preaching error.

3. It is, perhaps, only giving another form of the same objection, if we observe how very little the people are to be trusted with a discretion upon religious subjects. If their excitement upon political questions is perilous, and requires the regulating checks which we have more than once discussed (Chap. ii. and iii.), far more is their excitement to be dreaded in matters that appeal directly to the much more powerful feelings connected with religion—matters upon which the bulk of men, in all ages and countries, have been found to feel only, and not to reason. The history of the species is full of examples fearfully proving the force of religious impressions in disturbing the judgment, and even perverting the whole heart of man, rendering him capable of the most savage, as well as the most absurd actions. It is needless to dwell longer on a topic which at once shows the expediency of an Established Church, the only effectual means of checking and tempering these overpowering feelings. All the arguments in favour of checks and balances apply to this with redoubled force.

4. The indolence imputed to the Ministers of a State Church may certainly be carried too far; but it is, perhaps, less hurtful, even when thus found in excess, than the extreme activity of the popular sectary. Whoever has well considered the effect of sect striving against sect—of each pulpit being made the place of attack upon its neighbouring chair—of

rival expounders seeking to render themselves more precious in the eyes of their hearers by outdoing one another in the rigour of their outward penances, and the extravagance of their awful denunciations—of an active competition even in the vehemence and the mystery of their spiritual dogmas—will confess that quietism is the safer extreme, if into one extreme or the other the religious instructor must run. It is better, as has been said, that a little indolence and quietism should be purchased by a State provision, than that the people should be exposed to all the mischiefs of excessive and fanatical activity—of the zeal which burns with far more heat than light. *Mallem illorum negligentiam, quam istorum pravam diligentiam.* An indolent priesthood, too, is seldom a persecuting one; it is a better, because a more peaceable neighbour, than an over-zealous volunteer system. Yet there is also a preventive of too great indolence: the activity of sectaries, where toleration is established, will always prevent the State endowment from engendering too great indifference among its ministers.

5. Among the objections to an Establishment we found a very important one in the political uses to which it is capable of being turned—its ready subserviency to the views of the Civil Magistrate. But a great mistake would be committed by any one who should suppose that no secular interference can belong to the most entirely voluntary system of religious instruction. The nature of sectarian priests is to the full as busy as that of an established clergy; and it is more restless, self-confident, and intolerant. For examples of this we need not go back to the seventeenth century. Our own times afford instances in abundance, to prove how easily the sectarian pastor unites with his sacred calling the secular functions of the political agitator. This is not confined to Ireland; we have experience in this country of its operation; and if any proof were wanting, how very easy it is for

zealous men to pretend, or perhaps really to feel, a call towards secular politics as a part of their spiritual vocation, let it be remembered, that both in Scotland and in England the purely temporal question of the Corn Laws has, in our own day, been taken up by a large number of the dissenting ministers of both countries, upon the alleged ground that it is a religious question,—a ground, however, disclaimed by all rational statesmen, how strongly soever attached to the opinion which these zealots supported. There is, in truth, no one question which such persons may not represent as falling within the scope of their sacred ministry; and if the whole community were under their guidance in spiritual matters, its civil administration, if it fell not into their hands, would at least be materially affected by their influence.

It is certainly, if not a positive benefit resulting from an Established Church, a very great set-off against the inconvenience of its political subserviency, that it enables the government to be administered without any serious obstruction arising from the operation of public feelings excited by spiritual guides. The influence of the State over the pastors of the people may be sometimes abused to civil purposes; but the nature of religious zeal cannot permit us to doubt that this is a far less mischief than the existence of an all-powerful and wholly independent clergy in any community.

The Church of England consists, strictly speaking, of the lay as well as the clerical members of that communion; but, popularly speaking, it signifies the latter alone. The government of it is vested in two archbishops, who have under them, the one, twenty, and the other, five bishops. The deans and chapters are the councils of the prelates, or archbishops and bishops. The prelates have seats in the House of Lords. The

parochial clergy are between 10,000 and 11,000 beneficed, and somewhat more than 5,000 curates. The patronage of the sees is vested in the Crown; of the benefices in the Crown, the prelates, and private individuals, including some municipal and other corporate bodies. The Crown has between 900 and 1,000, the prelates about 1,200, deans and chapters nearly 800, other ecclesiastical bodies nearly 2,000, universities and lay hospitals above 700, municipal corporations about 50, and private persons about 5,000. The incomes of the prelates vary from £900 to nearly £20,000 a-year; but they are in the course of being arranged so as to give the least £4,000. The revenues of the prelates amount to about £160,000; of the chapters to £154,000; of the benefices to about £3,000,000; of the curates to little more than £400,000,—giving an average of under £300 for incumbents, and for curates about £80. In each archbishop's province there is a *Convocation*, consisting of the prelates and ecclesiastical officers, with representatives of the inferior clergy. The convocation is summoned as often as Parliament is assembled; and though formerly they used to tax the clergy, for two centuries this has fallen into disuse; and they only deliberate upon matters of an ecclesiastical description. But they cannot deliberate without license from the Crown; and their resolutions, which only bind the clergy, require the royal assent. Their assembling has become little more than a form.

The body of Dissenters in England is very considerable. Of the Methodists (Calvinist and Arminian), there are upwards of a million, who do not, however, materially differ with the Church in religious tenets. Of other Protestant Dissenters there may be 1,500,000, and of Roman Catholics little more than 500,000. There is no longer any exclusion from Parliament, or from office, on account of religious belief, except that the Crown, the Regency, the Great Seal, and the Rolls,

cannot be held by Roman Catholics. It must be observed that the Thirty-nine Articles, setting forth the principles of the religion of the Church, and to which subscription is required of all clergymen, were framed and afterwards moulded three centuries ago in a spirit of comprehension, and so as by mutual concession to enable, as far as possible, Dissenters to join.

The Church of Ireland* is governed by four archbishops, having eighteen bishops under them; but now these numbers are in course of reduction to two archbishoprics, and ten bishoprics. The episcopal revenue is in the course of reduction from about £150,000 to £82,000, the chapitral to about £55,000. That of the 1,400 benefices is about £600,000. The Roman Catholic Church has similar archbishoprics and bishoprics, the Pope appointing to them all, though generally attending to the recommendation of the Irish prelates upon each vacancy. The whole revenues of the Romish parish priests, as well as of the prelates, are derived from voluntary contributions of the parishioners, and the fees upon marriage and baptism, and on masses. There are many convents and monasteries in Ireland; and they derive considerable income from donations, as well as from those who take the vow, and give up their property. The proportion of Catholics is supposed to be about three-fourths of the whole people, or 6,000,000 in all; persons belonging to the Church about one-tenth of the people; and Protestant Dissenters less than a-tenth, or between 600,000 and 700,000.

The Church (or Kirk) of Scotland is formed upon a republican scheme. No prelates or other dignitaries are allowed, nor any influence given to the Sovereign, except in the appointment to such benefices as are vested in the Crown, being about one-third of the whole thousand; the parishioners, how-

* Strictly speaking, the Church of the two countries is the United Church of England and Ireland.

ever, claim to control this, which has given rise to a division of the Church. The government is vested in the Kirk-session, composed of the minister and lay elders, chosen by the session after publication of names to the parish, so that objections may be offered and considered. From the session an appeal goes to the Presbytery, which is composed of the ministers and lay elders of the parishes within a certain district; and from the presbytery an appeal lies to the Synod, composed of several presbyteries. The highest court is the General Assembly, which meets once a-year for ten days; and if any matters are left undisposed of, they are taken up by the Commission, consisting of the members of Assembly; and it has the power to sit during the recess. The General Assembly is composed of the ministers and elders chosen by the presbyteries to represent them, elders from the royal boroughs, representatives of the universities—in all 386. It is attended by a Lord High Commissioner appointed by the Crown, who, however, is merely present as a matter of form and state, and takes no part whatever in the proceedings; nor is his presence required in order to give them validity. The Assembly chooses its president, called Moderator, now always a minister, but formerly a layman, though rarely, held the office. The whole income of the clergy amounts to about £200,000, from all sources—chiefly teinds or tithes—which are to some extent still unexhausted, in the hands of lay impropriators; and the Court of Session, from time to time, augments small livings out of this fund.

The Presbyterian Dissenters from the Kirk are chiefly on grounds of a political description, as the right of patronage and claims of ecclesiastical independence. But there are some Baptists, some few Unitarians, some Independents, and a considerable number of Episcopalians—chiefly in the great towns. The Roman Catholics are much more numerous,

especially in the Highland districts: there are supposed to be about 140,000 in all. The whole number (including Catholics, and Protestants without the pale of the Kirk) is close upon two millions.

It must be allowed that the Established Church in England is slow to interfere, as a body, in secular matters; and that the clerical members, generally speaking, do not take a factious part in political controversy. Their leaning, for the most part, is towards the Government. Both in Parliament and in the country, they incline towards the Crown upon ordinary occasions. From the House of Commons they are excluded; as a body, in the House of Lords, they do not, even upon ecclesiastical matters, show a more united appearance than temporal peers. In Scotland, the leaning of the clerical body is also towards the Government. In Ireland—where the position of the clergy is exceedingly difficult, from the great preponderance in number of the Roman Catholics, and the influence of their priesthood—the good conduct of the clergy is exemplary, although they are almost unavoidably drawn occasionally into party feuds; but they are a contrast, and should be an example, to their brethren of the Romanist persuasion.

The weight of the Church, generally, must be considered as thrown into the scale of the Crown, and as given to the support of the existing institutions. It occasionally happens that this resisting or conservative influence obstructs improvement; and it has sometimes been much and justly lamented by the friends of social progress.

CHAPTER XIX.

JUDICIAL ESTABLISHMENTS.

SECTION I.—*Promulgation of the Law.*

THERE is a preliminary duty with respect to the administration of justice, which is especially incumbent upon the government. It is bound to make the laws known to the people upon whom they are to be enforced; to make the rules which are to govern the administration of justice known by the subjects of that administration. This important function is best performed by taking care that each legal provision shall be framed clearly and intelligibly. Now, as in every country there are two kinds of law—one written, the other unwritten or customary; and as the latter may be vague and uncertain and little known—possibly incapable of being well known, even if every care had been taken to frame it with clearness and precision—it follows that every government is bound to digest the whole of the law into a code which its subjects may have access to, for the purpose of learning by what rules their conduct is to be governed, what things they are commanded, what permitted, what forbidden to do, what rights they possess, what duties are imposed upon them. No government does its duty, or performs its functions properly, which leaves its subjects without such a code of laws. This is true of all governments; and it is a proposition which has no dependence upon or connection with the frame of particular governments. In an absolute despotism, where the will of the sovereign makes the law, still there are fundamental principles unwritten,

and there are the edicts of the prince or his predecessors, which the people have a right to see digested into a compendious form. This code may be more concise than under constitutions more popular and more free; but still it is a code. No tribe, how rude so ever, lives by the daily and hourly rule of a chief: it has certain other usages to guide men's conduct, as well as the usage of implicitly obeying the chief; and these usages would be committed to writing, were the tribe more civilized, instead of being committed to the elders or the priests for remembrance. In all monarchies, even in the despotisms of the East, there are unwritten customs having the force of law; nay, paramount to the written law. To make them well known to its subjects is the bounden duty of the rulers in these absolute monarchies, as much as it is of the authorities in more limited systems of polity, or in democratic or aristocratic republics.

In general there are more strenuous opponents of such proceedings taken with a view to make the law easily read and well known, than the sovereigns in Monarchies or the statesmen in Commonwealths. The lawyers, and especially the judges, are very rarely friends of a Code. They dislike perhaps the rendering too easy the access to their own peculiar learning; they dislike certainly the restriction of their powers, the limiting and fixing of their discretion, which follows from reducing the law to a digested body or system. They oftentimes dread the changes in the law which are likely to result from reducing it to writing, and submitting it in distinct terms to the eye of reflecting and impartial men; but their habits make them averse to all change in the system which they have learned with much labour, and administered for a long time; they dislike going, as it were, again to school. Thus the wise and just project of digesting and arranging the whole body of the law in any country, is pretty sure to meet with stout opposition

from those who have grown grey under the former system, less clear, more vague, little defined, and resting in a greater or less degree upon the opinion, not always unanimous, never without some fluctuation, of the judges. But it is the duty of every government to overlook, if it cannot overcome this resistance, and to frame a clear and intelligible code of the laws, whatever may be the system upon which these laws are constructed.

When a government has given its subjects access to the laws by promulgating a code or digest of them, its next duty is to see that all alterations or additions which are made from time to time, shall become well known; and in making such alterations and additions it is equally the duty of the government to take care that regard shall be paid to the existing law, as contained in the code, that no inconsistent provision shall be introduced, unless the former ones are expressly abrogated, and that the new laws shall be expressed in clear and unequivocal language. Nothing without such precautions can prevent the introduction of inaccuracy and uncertainty into the system; and nothing else can preserve the code already promulgated in its usefulness.

A third, and a most important duty of the supreme authority in each state, subservient to the due promulgation of the law, is to take care that all laws which are enacted shall be conceived in terms plain, intelligible, and consistent; and this applies as well to the constitution of the code as to the laws subsequently enacted. In framing the code, as well as in preparing any particular law or ordinance, the cardinal rules are,—1. To employ words in their known meaning, either the vulgar acceptation, where no legislative or judicial authority has modified it, or in the sense affixed to these words by such authority. 2. To use the same words always where the same things are intended. 3. To use different words where different things are in-

tended. 4. To explain or define this by means of terms already explained or defined, proceeding always from what is known to what is unknown. 5. To refer from any given part of the code or law to any other part, not by general description, but by the number of the article, or subdivision of the article. 6. To arrange the subjects of enactment systematically, but to number the whole articles of the code or law in one consecutive series. 7. To adopt such a style of composition as may be full and explanatory, at the risk of prolixity, but not more prolix than is needful for clearness.

The rulers of mankind have most imperfectly discharged their duties, both of digesting the laws in codes, and of carefully superintending their alteration.

In ancient times we have various examples of codes in different ages; but of the earlier ones we know little more than the names, and nothing with any certainty. The laws of Minos in Crete, who, if ever he existed, flourished fourteen or fifteen centuries before our era, are purely fabulous. The legislative rules ascribed to him existed in Plato's time, a thousand years later. But we know little for certain of the laws of Lycurgus, who lived nine centuries, or those of Solon, who lived six centuries before Christ. Draco preceded him by half a century; and we only know the severity of his penal enactments, which treated the least disobedience of the laws as rebellion, and therefore punished it with death. This alone we can be sure of, that each of these legislators did give a body of laws to his countrymen, probably very general and very concise, though we are wholly uncertain if their rules ever were reduced to writing. If they ever were, it is unquestionable that not a fragment of their text remains, although we have some knowledge of their general provisions. Diocles of Syracuse is said at a later period to have framed a code for a portion of the Sicilians; Zaleucus for the Locrians of Italy; and

Charondas for some of the Sicilian States. How little we know of those codes may be gathered from this, that there was a dispute in Cicero's time whether Zaleucus ever existed (De Legg, lib. ii., c. 6), and of Diocles and Charondas, nothing whatever can be ascertained. About the middle of the fifth century before Christ, the Romans sent commissioners to Greece, and imported something like a code from thence. It formed the basis of their jurisprudence, under the well-known name of the Twelve Tables; but nothing can be more meagre than its provisions, in so far as they have reached our times. That the whole of the document was very concise we may be sure, both from the laconic style of the parts which remain, and from this, that the children were taught these laws as part of their catechism, and made to learn them by heart almost down to the time of Cicero. Julius Cæsar, that nothing might be wanting to his singular and universal glory, had planned a complete digest of the Roman laws, which from the number of senatorial enactments *(Senatus consulta)* and Prætorian edicts had become very numerous; but he lived not to accomplish this great work. Early in the fourth century two private lawyers, Gregorius and Hermogenes, digested the laws, at least the imperial laws, then in force; but no portion of their works remains, unless in so far as they may be incorporated in the subsequent codes. Indeed, there is great doubt whether the Gregorian and Hermogenian are two codes or only one code begun by Gregorius and continued by Hermogenes. At length Theodosius II. appointed a body of lawyers to form the code which passes by his name, and is still extant. It was published A.D. 438. Justinian, in A.D. 528, published his code of the Imperial Constitutions, a work which occupied the lawyers whom he employed on it only fourteen months; but they had the great benefit of the Theodosian code to assist them. Soon after he appointed

the same learned men, with Tribonian at their head, to undertake a far more extensive and difficult work—a digest of the whole Roman law, from the earliest times, scattered as it was over above two thousand treatises; but forty of these, and chiefly that of Ulpian, were for the most part consulted by the learned commission. All the authorities are cited in the work, and it appears that about one-third of it is taken from Ulpian. The emperor gave them ten years to complete their great work, but they accomplished it in three. The code had appeared in A.D. 528, the Pandects or Digest, in fifty books, followed, in 533, and the Institute, a work of unrivalled clearness, conciseness, and arrangement, in four books, the same year—indeed, some weeks earlier than the Pandects.

The Gothic nations likewise had their codes, of which that of the Visigoths was probably the earliest. It was compiled after the Theodosian code, about A.D. 470, but was extended and improved in 506; afterwards it was united with the Roman law in 652, and published in its complete form at the council of Toledo in 693. The Burgundian laws were digested about 501: the Salic soon after; then the Ripuarian,—but these for a long time remained unwritten: the Salic and Ripuarian were only reduced to writing in the seventh century.

In 644 Rothius made a digest of the Lombard laws, which his successors greatly improved, and next to the Visigoth code this had the greatest estimation among the Gothic nations. It is singular enough that no attempt at a code should have been made for a thousand years after that period, if we except the imperfect instruments prepared by some of our Saxon kings, and which fell far short of the works accomplished in the earlier part of the dark ages. The parliament in Cromwell's time took up the subject, but according to the Protector's well-known phrase, "The sons of Zeruiah were too powerful:" the lawyers

obstructed the work. In 1750 Frederick II. of Prussia caused a code to be promulgated, which was called by his name, and is the first modern compilation which has any pretensions to the title of a complete digest, though its execution is extremely defective. In 1794 his successor gave his States a much better digest, termed the *Land-recht* or national law. In Austria the work was begun as early as 1753, in imitation of Prussia, and it was fully published in 1811 under the name of the *Gesets Buch*, or Book of Laws.

In 1802 the most celebrated of all codes in any age, the Five codes of Napoleon, were carefully prepared, after full discussion in the Council of State. But the most difficult of the whole—the Civil code—was rendered of easier execution by the great progress which had been made under the republic, as early as 1793-4, in a similar work. Hence the *Code Civile* of the Consulate was prepared in four months. The other four codes are,—the criminal code (*Penale*); the commercial (*De Commerce*); the code of civil and the code of criminal procedure (*Instruction Civile* and *Criminel*). A sixth code was afterwards added, of the fiscal laws, and Napoleon also had one of a military kind prepared and published—the *Code de Conscription*. In preparing this great work there was no slavish adherence to the old law; yet it was in every instance retained, unless where clear and obvious reasons for a change presented themselves. It is a monument of the industry and learning of its authors, and it conferred on the country the inestimable benefit of putting in their possession a plain and distinct rule of conduct, and one which was the same for the whole community, instead of leaving the people of each district, often of each portion of the same town or village, living under different systems of law.

In 1813 a penal code was published for Bavaria, accompanied with a strange edict, prohibiting all lawyers or men in office from printing any commen-

taries upon it. A code for the Lombardo-Venetian kingdom was published in 1820, founded upon the *Gesets Buch*. A code both civil and criminal was published in 1830 for the Sardinian Monarchy. Finally, the Americans have made some progress in the same important work,—Louisiana, New York, and South Carolina, now possess codes, and learned men are at work upon the same plan in other parts of the Union.

After much delay and full discussion, it appears that England is at length to obtain this inestimable blessing. The commissioners, appointed in 1833 to investigate this subject, have reported not only their opinion, with their reasons in its favour, but have prepared a careful digest of the criminal law, both statutory and unwritten. A bill, embodying this code in eight or nine hundred sections, was well received by the House of Lords in 1843; and it certainly must be followed both by a code of criminal procedure, which is already prepared, and by a civil code. It is very much to be expected, as well as desired, that these English codes will be adopted by other countries, especially by those of the New World.

If little has as yet been actually accomplished in giving codes to the nations of Europe, still less has been done towards providing for a systematic care and attention in the additions successively made to the existing laws. There is no country in which the government has established a department for superintending the preparation of new enactments, with due regard in each case to the former laws upon the same subject-matter, to the general principles of sound legislation, and to that which the people of every state have an unquestionable right to demand of the superior power, the clear, unequivocal, and consistent expression of its will. Inconsistent, even contradictory, provisions are made in the same law; different language is used in the same sense, and the same

language in different senses; references are made to other enactments as hereinbefore contained, when none such appear; commands, or prohibitions, or declarations are given forth which are capable of various constructions; repetitions and tautologies are used, which both bewilder the reader and give rise to serious doubts of the lawgiver's meaning; the reasons in the preamble sometimes go beyond and sometimes fall short of the enactments; the title frequently ill expresses the subject-matter of the law; much is left to private individual legislators, unconnected with the government, and wholly irresponsible; one man alters another's plan, without intending it, by adding or taking away some portion of it, without due attention to the rest; one branch of the legislature adds or changes what the other has done, without intending it, or, meaning to change it, leaves it untouched;—in short, nothing can possibly be considered more inadequately performed than this function of the government; and yet it is among the most important of its functions, the most imperative of its duties, being neither more nor less than letting the people know what rights are bestowed on them by their rulers, and what obligations imposed.

SECTION II.—*Judicial Enforcement of the Law.*

The most important function of government is its care of the judicial establishment, or the constitution of courts which may well administer the laws. The judicial department consists of two branches—preparatory and final. We are now to consider the latter and more important, and to examine the principles which ought to govern its constitution and action.

In order that the system of final judicature in any country should be capable of performing its office, that of affording the inhabitants an easy and expeditious enforcement of their civil rights, and awarding

punishments to transgressions of the law, it is necessary that the following principles should be kept in view. In proportion as the system is founded upon them, it will approach to perfection. They all flow, and naturally flow, from the manifestly true position, that the object of a final judicature is to try causes and offenders as justly, as cheaply, and as expeditiously as possible—that is to say, with as little cost as possible either in money or in vexation to the parties, and as little cost to the State, and as little delay and suffering to the parties, as is consistent with the complete examination of each case and the doing full justice.

1. There ought to be a sufficient number of judges appointed, to prevent the suitor being delayed and the offender being detained previous to his trial. The only limit to the number short of this point, the only justifiable ground of having fewer judges than are required to despatch the whole business of the suitors and the public, is the bar not being able to furnish a sufficient supply of men fully qualified for exercising the judicial office. Lawyers alone, persons well versed both in the learning of the legal profession, and in its practical applications to causes that actually are brought into court, can safely be trusted with this high station. It may not be necessary that a judge, while in the practice of the profession, should have been an able or successful advocate. On the contrary, great skill in this respect has a tendency to incapacitate him as a judge by inducing habits of another kind than judicial, and lawyers have in every country been raised to the bench and become eminent judges, who had little or no favour as practitioners. But, generally speaking, without sufficient experience of the profession in practice, no one has a reasonable chance of being qualified for the exercise of judicial functions. He will be deficient in readiness, in knowledge of details, in self-confidence, to say nothing of

the want of public confidence, which might be supplied by the observation of his capacity as a judge. The power of the bar to supply judges must depend upon the amount of litigation carried on in any country; and the having a much greater number of judicial places than the bar can afford able men well to fill them, has manifestly a detrimental effect both by lowering the judicial character, and by creating an imperfect administration of justice.

When we say that the judges should be as numerous as the resources of the legal profession will supply, we also mean that they must be locally situated, so as to bring justice near to every man's door. Nothing can be more hard than driving either parties or witnesses to great distances from their homes—nothing can more tend to paralyze the arm of justice. It must, however, be admitted that the circulation of judges of the highest class, who generally sit in the capital, by their occasionally presiding over trials in the provinces, is a great help to a due administration of the law, and tends to remove the evil which is apt to attend a local judicature, of contracted views and confined knowledge in the judges.

2. The courts should be so constituted that the judges may not be too numerous, so as to lessen individual responsibility, and yet that more than a single judge should decide on all important causes where jury trial is not used. For weighing conflicting evidence, for awarding compensation, for the exercise, generally, of discretionary judicial powers, the conflict of differently constituted minds is extremely useful. But even for well applying the strict letter of the law to the circumstances of individual cases, and for expounding its different passages, there is much safety in numbers. A security is thus afforded against oversight. What may have escaped one judge will present itself to his colleagues. The view that strikes this person as unobjectionable may seem to another

unsound. The discussion of the question by the members of the bench will tend to produce the same beneficial effect to the discovery of truth after the parties have closed their arguments, which these arguments, on either side, produced in bringing the whole of the matter in controversy before the court. It was found, when the Judicial Committee of the Privy Council was formed, in 1833, that judgments were frequently pronounced with the entire concurrence of its members, while each of the four judges felt that, had he alone heard and decided, his judgment would have been different in particulars more or less important. The number of judges, on the whole, most convenient, seems to be four, because the great majority of three required for decision tends to give confidence in the result of the court's deliberations. The possible equality of votes is found in practice to create little mischief. In the Privy Council, where four has always been the number since I new modelled it in 1833, only one case has occurred of an equal division, and the consequent necessity of a rehearing. In the case of courts from which there lies an appeal, no rehearing would be necessary on an equality of voices; an appeal only would be required. When Mr. Bentham and his school so strenuously contend for what they call "single-seated justice," on the ground that no other course secures full and undivided responsibility, they forget that it is of first-rate moment to guard against involuntary error, which will creep in as long as men are fallible, however you may excite them to honest and strenuous exertion of their faculties by laying on them individual responsibility, and though you thus diminish the risk of voluntary error.—They next forget the compensation which arises in respect of responsibility itself from the watchful eyes of brother judges—a tribunal fully more formidable than the public or even the bar, and a tribunal whose members must needs know a great

deal more intimately than any spectators can the errors and negligences of each other.—Lastly, the same reasoners forget the security which is afforded, and may always be obtained, against improper judicial appointments, or inefficient judicial exertions, by requiring each judge to give, either always, or in rotation, his reasons, and still more by requiring, on great questions, that their reasons be reduced to writing. As for the remedy against error which they contend may be found by means of a system of appeals, they still further err; they forget how immense the importance is of having a right judgment in the first instance, in order to spare parties the vexation and expense of setting errors right in a superior tribunal; and they forget that in causes of petty amount there hardly can be any appeal.

3. There ought to be a due division of judicial labour, for the purpose of securing expertness in the performance of it. If one court has chiefly the cognizance of particular causes, these will be more satisfactorily dealt with by that body than if each cause could be taken indiscriminately to any of the courts. But, on the other hand, this distribution should not be made too minutely, and it ought in a certain degree to be optional with the suitor. For too minute a subdivision of business tends to contract the minds of those who perform it, and any absolute right to try one kind of causes will prevent the salutary operation of competition. The Court of Kings' Bench and Common Pleas present a good example of this distribution not carried to hurtful excess. Real actions could only be tried in the one; criminal informations, *quo warranto* and *mandamus*, are confined to the other. But all personal actions may be tried equally in both. Perhaps the doors of each might be opened a little to the trial of those cases which now are of exclusive cognizance in one or the other.

4. To secure the independence of the judges they ought to hold their offices for life, only removable upon misconduct, proved to the satisfaction of some competent tribunal. The statement of this principle, the most important of all to the right constitution of courts, shows how far short of perfection the judicial system must fall in all despotic governments; and this for two reasons,—*first*, an independent body of functionaries, so important as the judges, is not compatible with absolute monarchy; and, *secondly*, were it to exist, there being no tribunal with power to try judicial delinquency, no power of removing the judges for misconduct could exist unless in the sovereign's own hands. Judicial independence, then, in such a form of government, is impossible. In the more mitigated despotisms of western Europe, as under the old French Monarchy, we have seen that a considerable degree of judicial independence was attained, and chiefly by the sale and the irresponsible nature of places in the parliaments; a great evil in itself no doubt, but one of which the tendency was to a certain degree compensated by the security given to the judicial station. We may observe on the singular position of Mr. Bentham, that offices of all kinds should be sold to the highest bidder, after the law has affixed to each the possession of certain qualifications, that nothing could make this safe but the qualifications being as clear and certain as items in an account.

In England, happily, all judicial places, except the highest, that of Chancellor, have for the last century and a-half been held for life. That high officer has little chance of being called upon to decide political questions; yet he may, in the capacity of President of the High Court of Appeal, be so called, and he may, and he often does, in his own court, decide questions seriously affecting the personal interests of the sovereign whom he serves. The removable nature of the office held by all the judges in the Judicial

Committee of the Privy Council, is hardly an exception to the rule, for none of these hold any place of profit by belonging to the Privy Council, save the Lord President, who rarely acts in a judicial capacity.

It is, however, certain that another class of judges, acting without any salary, and discharging very important duties, are removable by the executive government—the Justices of Peace. The benefits which arise to the community, from the powers of the Magistracy being vested in the landowners and other respectable inhabitants of the country, are very great. The people thus become not only part of the judicial system, but the higher classes diffuse among the lower an habitual veneration for the law. The saving of revenue to the State is also very great. It is, however, to be wished that some arrangement were adopted for placing paid and professional functionaries at the head of the different benches of Magistrates. The advantage of this is obvious when we consider that, at some sessions, four or five times as many prisoners are tried as any of the judges in Westminster Hall try in the course of the year. The duty of presiding over such tribunals is far too arduous for a country gentleman or other unprofessional person. Nor would it be an inconsiderable relief to the Magistrates, when acting singly or in small numbers at petty sessions, to have a learned person, whose assistance and advice they might obtain upon any difficulty occurring. As to the dependence of the Justices upon the Government, little needs be said. They ought clearly to hold their places for life, or good behaviour, like the superior magistrates of the country. When we say that in practice they do so, no Chancellor ever removing a Justice from the Commission unless he has been tried and convicted of some offence, what is that but admitting that the law should be made conformable to the practice? Besides, the same course of practice does not extend to all parts of the United Kingdom.

In Ireland magistrates are removed at the discretion of the executive government.*

5. The independence of judges is not, however, sufficiently secured by the life-tenure; they ought also to be incapable of receiving any other promotion from the Government, either by being raised higher in the judicial system, or by holding any other place, or by receiving any other favour from the State. The promotion of puisne judges in England to the place of chiefs or presiding judges is exceedingly objectionable in this view. Although we owe some excellent appointments to the practice, it is to be reprobated, as tending to render the judges subservient, make them look to Court favour, and lead them to mix themselves in political matters. In order to compensate for their having no chance of further promotion, the judges ought not only to enjoy a very exalted rank in the community, but to receive most ample remuneration. There can be no worse economy, no more insane parsimony in any State than underpaying such functionaries as judges. The small emoluments of the French judges, owing in part to their excessive numbers, might justly be considered as one of the greatest blots in the once free constitution of France. To give the member of a *Cour Royale* only £120 or £150 a-year, is at once to say that the first lawyers shall not be raised to the bench, and that inferior men may be tempted to enlarge their small salary by irregular gains. To say, what has often been said, that those who have other means or property of their own in the neighbourhood, may thus eke out their deficient income, and continue to support the dignity of their station, is only saying that the choice of the judges

* In the Colonies all judicial offices are held during pleasure. This is understood to be absolutely necessary to prevent dangerous differences between the Government and the Bench. Possibly such ample salaries as might enable the State to obtain the services of eminent members of the bar in these capacities, might render the removal of Colonial judges, if not unknown, yet of very rare occurrence.

shall be confined to such persons as have accidentally those means of subsistence; for while a man of sufficient fortune may be wanting in professional qualification, a man richly endowed with these may be without any private income at all.

6. The judges being paid sufficiently in salary, ought, generally speaking, to take no further emolument from fees. This is necessary to prevent abuses from creeping in, and justice from being sold. But the followers of Mr. Bentham have proscribed all fees much too rigorously. Fees either of uncertain amount, or received for any step in the procedure which the judge has the power of commanding or not at his pleasure, are plainly objectionable, because they lead directly to increase of litigation by multiplying the steps of the proceeding. But if the amount of the fee be fixed, and the judge receives it as of course for some part of the proceeding before him which must take place, it is impossible to see how he can have either the wish or the power to exact more than the law permits of any suitor. If the fee is paid upon the final adjudication of the cause, there is even a stimulus given to the judge's diligence in despatching business, and no door is opened to any abuse whatever. If it be deemed necessary to throw the whole expenses of justice upon the State, and prevent parties from paying any portion of it, this is a very sufficient reason against any fees being levied at all; but it is a reason of an entirely different kind, and it is a reason which applies little, if at all, to allowing certain very small fees to be exacted upon the termination of a suit, from the party against whom the judgment is given. Experience shows that when the judges are paid by far the greater portion of their emoluments by a fixed salary, and are allowed to make a very considerable addition to their income by taking fees on the business done, they are quickened in their diligence, and give more despatch to the suitor. In England, a few

shillings thus received on each *Nisi Prius* trial has been found to produce this effect. The adding three or four hundred pounds to a salary of five thousand or more, quickens their industry; and to range the objection to this practice under the head of throwing the expense of the judicial establishment on the suitors, would be a childish and preposterous pedantry, the exaggerated enforcement of an undeniably true principle. Payments of this description are much more necessary in the case of those inferior judicial functionaries, who are little before the eyes of the profession. I was most anxious to preserve them for the Masters in Chancery when I reformed their important office in 1833. The consequence of entirely abolishing their fees, which I was forced to permit, much against my inclination, was to lessen their despatch of business. A great change took place in the very first year in the number of matters despatched in their office.

7. That no patronage whatever should be vested in any judges, is a certain and undeniable principle. It only tends to bias them in the discharge of their duty, to bring them in contact with political party, to diminish the veneration in which they should be held, and to lessen the independence of the practitioners before them.

8. For similar reasons they ought to be excluded from all share in the government of the State, and be incapable of holding political offices; and in countries living under a popular or an aristocratic government, they should be peremptorily excluded from seats in either popular or patrician assemblies. There is nothing so much to be dreaded as a popular judge. When Lord Bacon termed a popular judge a hateful thing, he restricted his observation to one form of the great mischief. A party judge is always detestable, and the corrupting influence of party connection is the more entirely to be dreaded, that it sways natures far

too honest to be in any risk of being tainted by the influence of mere vulgar corruption.

9. The expense of the judicial establishment should in every country be defrayed by the State. There is no reason whatever for throwing any part of it upon the suitor, or the private prosecutor, or the suspected offender. Taxes upon law proceedings have been long since exploded by the irrefragable demonstration of Mr. Bentham, in the most faultless, and one of the most important of all his works,—his Protest against Law Taxes. To enlarge upon a doctrine now universally admitted, would be wholly superfluous. But it does not strike at such small sums, by way of despatch money, as have already been adverted to. The doctrine, too, is liable to other limitations. It is impossible to admit the rigorous principle in its full extent, that no part of the expenses of judicial proceedings should fall upon the parties to them more than upon the rest of the community. Although we must admit fully that to make these parties pay for the administration of justice generally, would be as contrary to all principle as to make the town which is attacked pay the soldiers who defend it; nevertheless, there seems to be no injustice whatever in charging upon some party or other a limited portion of the expense. Thus, suppose a fine were part of any one's punishment who is convicted of a crime, no principle could be violated, provided the party too poor to pay were otherwise punished. So, if the party found to have either brought or defended an action without the colour of right on his side, were fined, no harm would be done. Again, there are certain suits which in truth are not contentions between parties, but the administration of private estates owned by infants, or lunatics, or persons understood to be placed under the eye of the court; for the benefit of this assistance the party is as much bound to pay as he is for his private agent or other servant whose work and wages are thus

saved to him. A moderate sum exacted for the support of courts of justice in all such cases is quite reasonable, and falls not at all within the scope of the arguments, generally speaking, irrefragably urged against Law Taxes.

10. It is essential to the due and pure administration of justice, that the courts of judicature which decide causes, in the first instance should be subject to review by way of appeal. Each court should have a reasonable opportunity afforded of rectifying the mistakes which it may have committed; and questions of difficulty, even where ultimately decided by any court, should be subject to the review of the supreme court, exercising appellate jurisdiction over the whole tribunals of the country. It is necessary to have this ultimate appeal for two reasons: the knowledge that their judgments are liable to review operates to stimulate the diligence and to keep pure the decisions of the subordinate courts; and the superintendence of the appellate court keeps the administration of the law and its interpretation uniform. There is no use, but much inconvenience, in a greater succession of tribunals, one above the other—all that is wanted being one set of courts in the first instance, and one Superintending Court of Appeal over all.

The construction of the appellate court is always matter of equal difficulty and importance. For obvious reasons it must consist of sound judges, and certainly of a larger number than may suffice for the inferior courts, because the importance of its decisions is greater, and because different judges will possess a peculiarly extensive knowledge of different branches of jurisprudence. But the great difficulty lies here:—These judges must either belong to the ordinary and inferior courts, or they must belong exclusively to the Court of Appeal. In the former case it will be difficult to obtain their attendance without interrupting the business of their own peculiar courts; in the latter case they will be

less qualified to decide on appeals, because they will not have the everyday practice of dealing with all common cases, which alone can keep a judge's knowledge perfectly ready and sure. This dilemma is essential to the nature of things, and it is inextricable. But a kind of compromise may be made between the conflicting difficulties. By composing the appeal court of a sufficient number, part belonging to the courts below, part only judges of appeal, a sufficient judicial force may be secured, and judges fully qualified may be had; while the portion of the court exclusively judges of appeal being always present, will prevent any inconsistency, and maintain a uniformity in the decisions of the tribunal. The constitution of the Judicial Committee of our Privy Council was framed on this principle; and it has been admitted even by those who at first objected, that this body has worked admirably. From the variety of its judges, and from some being always present, uniformity of decision is preserved, while, whatever be the nature of the case coming before it, judges may easily be obtained of the peculiar qualifications required well to decide each. Its defect is, that there being no members who have salaries for their attendance, a difficulty frequently occurs of finding a sufficient number to form the quorum of the court; and the want of a permanent president is also felt. *

The House of Lords presents a great anomaly, among courts of appellate jurisdiction. Every peer is, by the constitution, a judge in all cases which are brought from courts of equity by appeal, whether on matter of law or fact, and on all matters of law from common law courts by writ of error, for defects appearing on the record. But for many ages the lawlords only have been in use to interfere in these cases. It is probable that some improvement of this tribunal will soon be deemed expedient; for where party considerations interfere, it may be found that the lawlords are not above such influence, and the interfer-

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ence of the lay peers would afford an imperfect remedy. The only security for the due administration of justice in this, as in all other courts, is to place it in the hands of judges wholly unconnected with political party.

11. All courts ought to sit and to give their judgments in public, and the fullest liberty should be given to the publication through the press of all their proceedings. Each court should have the power of excluding strangers in certain cases, which the interests of public morals, or the allowable feelings of families, require to be heard in private, and also of prohibiting the publication of proceedings before final judgment, in order to prevent undue interference with that judgment. These excepted cases are, however, of extremely rare occurrence, and the general establishment of publicity is an effectual check both upon injustice and upon negligence in the judges, as it is upon unfit appointments to judicial office by the Government.

12. All judges should be named by the executive government alone, without any interference whatever from any other quarter. In popular governments it is necessary that no political or party influence should ever be suffered to interfere in this most important affair. Hence the rule which has been adopted in our own Government, and which requires the responsible minister of justice, the Lord Chancellor, to select the judges and take the king's pleasure upon their appointment before he communicates their names to his colleagues, is wisely and wholesomely devised. It excludes party interference, and it leaves the responsibility of the Great Seal undivided. It is extremely wrong, and a great exception to this rule, that judges in Scotland and in the colonies are named by the Secretary of State. This practice is exceedingly to be reprobated, and ought without any delay to cease.

13. The judicial ought to be kept entirely distinct

from the legislative and executive power in the State. This separation is necessary, both to secure the independence of the judicial functions, and to prevent their being influenced by the interests of party or by the voice of the people. We have already had occasion to show that with this view the judges ought to be independent of the Government, and excluded from sharing in either legislative or administrative duties. But the separation which we are now considering may not be effectually made, even if they are independent, and have no seats in either the councils or the legislative bodies of the community. Thus it is very possible that no judge may be a peer in England. Between Lord Ellenborough's death, in 1818, and Lord Tenterden's peerage, in 1827, the Chancellor alone, of all the judges, was a peer, and he might have been Lord-Keeper, and had no voice in the House of Lords; and yet the legislative office would have been combined with the judicial in the House of Lords, contrary to the principle which we are now explaining. This union is wholly to be reprobated. It is a great anomaly in the Constitution of England. It has occasionally, though rarely, given rise to mischief in the administration of justice. It may any day give rise to mischief, much more frequently recurring, and much more hurtfully operating. The sooner it is removed by the creation of a high appeal court, of which the members are wholly removed from all political functions whatever, so much the better.

These are the fundamental principles or rules, upon which a good judicial system must be constructed. In order that it should be as perfect as can be expected, all these rules must be observed. In proportion as they are allowed to govern the system, that system will approach to perfection. In proportion as they are departed from, it will be imperfect.

The advantage of a good judicial system is altogether inestimable. It is of far greater importance

than any other branch either of the laws or of the constitution in every country. A people will be miserable under a good system of law, if its judicial system be defective; and it may be comparatively happy under an imperfect code of laws, if these laws are well known, not frequently changed, and justly administered. So a people will be wretched under a free government if its courts of justice are corrupt, or careless, or subject to the influence of the fickle multitude. And on the other hand, they may enjoy much happiness under an absolute government if the laws are fixed, and are administered ably and equally.

Section III.—*Functions of Police.*

Both additional and ancillary to the final distribution of justice, is the function of providing for the police of the community, also for superintending it when established. Over the judges the government has no superintendence whatever. According to the principle laid down, it appoints them, and ought there to leave them. Over the police department, which is partly of an executive kind, and ought to be wholly so, the government ought to have the superintendence and control.

By police is properly meant the care of preventing infractions of the law, detecting offenders, bringing them to justice, and executing the sentences of the courts.

1. By certain precautions the path of offenders may be beset with obstacles. Their actions may be watched; they may be scared while in the act of offending; they may be prevented from even making the attempt —by the certainty of the vigilant eye being upon them. The use of patrols in great towns and their vicinity is an example of these police operations. Fifty years ago it was impossible to travel by night near London without the risk of being robbed. The same risk was

general over the country a century ago. The horse patrol put an end to highway robbery near London in the course of a year or two. The use of watchmen in towns of all but the smallest size, is another and a familiar example of police service. Whatever lights a town well is a great help to the preventive operation of the police. Hence, the government should always lend encouragement to plans for lighting the great towns. This head of prevention includes as its principal branch the preservation of the public peace. All riots, mobs, disturbances, injuries to person or property from the excited feelings either of an individual or multitudes, can be prevented by the vigilance of a sufficient police force assembled on the immediate apprehension of a fray.

2. The tracing of offenders when a crime has been committed, and securing them so that they may abide the sentence of the law, is another and a most important duty of the police department. It demands much skill, and only experienced persons can well perform the office.

Both with reference to the first and the second head, that is, both regarding prevention and detection, the question arises as to the means of obtaining information, and, among others, the employment of spies. Much inconsiderate matter has been at various times introduced into the discussion of this subject, and it has sometimes been suggested that this dispute arises from men not attending to two very different classes of informers,—those who voluntarily come forward to discover some intended crime, whether from repentance of being concerned in planning it, or from more sordid motives, and those who are employed by the police to make inquiries where suspicions have been raised. But in truth, there is no soundness in the distinction thus taken between informers and spies. For no one doubts that an informer is to be remunerated as well as attended to. Indeed, offering a reward for the

discovery of offences is by the most rigid moralists permitted; and yet this reward, and whatever is given to a voluntary informer, has a direct tendency to make persons criminally connected together betray one another. If, again, it be said that by employing spies we encourage the treachery of a base set of men, and make it their interest to invent plots, and to seduce men into the commission of crimes in order to earn their pay, so we just as certainly hold out the same inducement to the volunteer informer. We give him an interest both in seducing persons from the path of duty, and in fabricating stories of crimes when his acts have failed to make criminals.

That the employment of spies, as well as the encouragement of informers, is one of the most delicate operations of government, and that it requires to be most sparingly used, and most jealously watched, is certain.

The tools with which this kind of work must be done are necessarily of the basest description; they have always a temptation both to deceive their employers and to encourage offences; hence too great caution cannot be used in employing them, or too great reluctance in listening to their stories. But whoever, on account of the possible risks of deception and of fabrication, would lay down a positive rule against ever having recourse to such agents on account of the immorality of the practice, must be also prepared to forbid ambassadors from obtaining secret intelligence, and commanders from sending scouts among their enemies. Nor only this—he must also be prepared to forbid offering any reward to seduce the accomplices in a murder from their faith towards the principal felon; and even he must go the absurd and extravagant length of forbidding a magistrate to receive information voluntarily tendered by a repentant criminal against his associates. According to such reasoning, the ministers, in 1820, were not perhaps bound in good

faith towards the Cato Street gang to sit on their chairs after dinner, and be massacred by hand grenades thrown into the dining-room; but they certainly were bound to turn a deaf ear to the milkman when he met Lord Harrowby, and told him he had a plot to unfold—for that informer was betraying his fellows, and in fact occasioned the death immediately of one or two, and the execution afterwards of the rest of the miscreant gang.

Then if it be said that we are at liberty to receive all information voluntarily tendered, but not to take any steps in order to obtain it, what shall be done if a plot is disclosed in its embryo state? The rigid moralist must, to be consistent, maintain that we can only be justified by waiting till it ripens, and can on no account send any one among the conspirators to discover the moment of their scheme exploding. The ministers in the case put were justified in hearing the milkman's story; but had he been ignorant of the place of rendezvous, or the time of marching, they ought on no account to have sent him back among his comrades in order to discover these particulars, without a knowledge of which it was wholly impossible to take precautions for the safety of the intended victims. Supposing an anonymous letter is received (as often happens), declaring that a plot for a rebellion, or for burning the city, is hatched, and that the conspirators meet secretly in a certain alley:—According to the extreme moralist, the police have no right to send a man in disguise, or to bribe over one of the conspirators whom the letter may name, in order to be carried by him to the haunt of the gang. No.—The risk of rebellion and of conflagration must be encountered rather than employ any device to obtain information. There are certain moralists so sturdy as to maintain, that if a highwayman holds a pistol to your breast, and extorts a promise to send him a ruinous sum by next post, you are bound to beggar your family rather than break

your promise. There are others yet more rigorous, (because folly has many degrees), and these hold that if a murderer asks you which road his victim took, you have no right to deceive him, and send him on a false errand. These reasoners, if to such as them the term may be applied, have a right to preserve their consistency by holding that no spy ought ever on any account to be employed, or any informer encouraged. They may keep their consistency, so we be allowed to keep our common sense, and not to paralyze the whole course of criminal justice, by refusing to prevent offences, and to detect offenders.

3. The bringing to trial offenders when detected and secured—that is, persons suspected on grave reasons of having committed offences—is another and a most important duty of government, falling under the head of police. But connected with this, and intermediate between seizure and prosecution, is a judicial function, that of determining whether the party seized shall be detained or liberated. This office is performed by the magistrate, and has all the qualities of a judicial office, and falls within all the rules laid down for the structure of final judicature. Indeed, it may be said to be a final judicature in one sense; for sentence of liberation amounts to acquittal for the prisoner, though it does not prevent a subsequent commitment for trial upon better evidence. The justices of peace in England perform this duty, and they have mixed with it their police functions. This union sins against the fundamental principles. The magistrate who is to inquire and determine whether or not a party seized shall be committed for trial, has as much a judicial function as the grand jury which puts him on his trial or discharges him. He ought to have no other office but that of thus deciding upon inquiring into all the facts of the case. Purely police duties may just as well be kept apart from magisterial or judicial in the country, as they almost entirely are in London. It

may, however, be convenient to enable a magistrate so far to act in a police matter as to issue his warrant for apprehension or for seizing goods or other matters to be used in evidence.

4. When the prosecution is resolved on, proper officers should be provided to prepare the case, and to conduct it before the judges. These are strictly ministerial and executive. This office, however, is extremely important; nor can any system of criminal procedure be other than most imperfect which has not a public prosecutor as one of its integral parts. To leave each individual in the community the power of prosecuting for all offences in the name of the sovereign, but at his own discretion, subject to the power of staying his proceedings vested in the sovereign, and at his own cost, subject to the court which tries the case allowing his reimbursement; to burden the injured party with the expense and trouble of bringing to justice him by whom he has been injured; to let wealthy offenders buy off their prosecutor, while poor men must stand their trial; to divide the responsibility of a culprit's escape who ought to be convicted, and of an innocent man's vexation and trial who ought never to have been tried, among three-and-twenty country gentlemen or tradesmen in towns, while no professional man is answerable at all either for the omission or the oppression; this is the English system of prosecution, and anything so bad, we may safely affirm, exists in no other country under the sun. In some cases, too, as if to exhibit its absurdities by contrast, the Crown prosecutes; in all political cases there is, as in all cases there ought to be, a responsible and able prosecutor interested for the State. But again, the popular principle here intervenes; for informations and indictments may be presented against political offenders and private parties; and instances of very remarkable prosecutions thus conducted are not wanting. The

celebrated case of the Dean of St. Asaph, which led to the amendment in the Law of Libel, 1792, by Mr. Erskine's great exertions, and Mr. Fox's Bill, was begun and conducted by a private individual in the Principality of Wales. In Scotland there is no grand jury, and there is a public prosecutor. The consequence is, that a responsible minister of justice must have directed or refused to direct every trial for any offence whatever. In England the grand jury has frequently put men on their trial for even capital offences, from party, or sectarian, or personal motives, where no man in the profession of the law would have ventured on such a proceeding. The responsibility of one among twenty-three grand jurors who decide by a majority, and are sworn to secrecy, so that it never can be known what vote each gives, amounts to exactly nothing. We might retain the grand jury in England as a check on the public prosecutor, who must be a servant of the Government; but to make the addition of this important officer to our system, appears a matter of absolute and of primary necessity.

5. The execution of sentences is the last function of police. The power of pardon and of commuting must always be vested in the executive government. It may indeed be abused; but this risk must be incurred in order, *first*, to prevent the enforcement of the law when circumstances may have come to light since sentence was passed, proving the party's innocence, or entitling him to a mitigation of the punishment awarded; *secondly*, to extend mercy towards persons who, after undergoing part of their punishment, may have shown claims to it by their demeanour; *thirdly*, to mitigate the rigour of the law, which may not suffer judges to take peculiar circumstances of human frailty into their consideration. These are the only good and solid grounds of this power. Two others are frequently stated, but they are wholly inadmissible. It is said that the power of pardoning gives a character of mercy

and kindness to the sovereign or the Government, which tends to strengthen their authority; and it is also said that the provisions of the law are sometimes too harsh, and therefore they should be relaxed. But just in so far as the prerogative of mercy interferes with the due administration of justice, it is an impure and illicit source from which to draw favour towards the Government. That favour will necessarily arise from the legitimate use of the power, and this is sufficient. Next, if the law is too severe, it ought to be amended, and its amendment is only delayed by this bad substitute of particular action for a general rule. If the provisions of the law are well framed to meet the general case, and only fall too heavily upon cases peculiarly circumstanced, then this forms a good ground for the interposition of the Government in those cases, and this accordingly forms the third of the cases already stated. Upon the pardoning or commuting power one observation arises, and it is important that this should ever be kept in view. The functionary who extends mercy in fact re-tries the cause, and he does so without the great advantage of seeing the witnesses examined, and their testimony sifted in open court. No more needs be said to prove how very sparingly this power ought always to be exercised. Hardly ever should it be used contrary to the opinion of the judge who tried the cause, and never on any account without a full communication with him, and hearing his opinion, unless where his death or imbecility supervening since the trial, renders this impossible. It seems hardly necessary to add, that no interference of parties interested, politically or personally, should ever be permitted with the exercising of this eminent function of the executive government. Absolute monarchies offer to our view no more hideous features than this gross perversion of justice. Nor do popular governments present a less hateful aspect, when they suffer the interference of the multitude either by violence or through the

press, or the debate, or any other channel in which clamour can operate, to defeat the provisions of the law. Of all the acts which drove James II. from the throne, there was none so justly execrated by mankind as the sale of pardons, in which his profligate court openly trafficked. Connected as it soon and naturally came to be with condemnations for the purpose of extorting money, and the actual punishment of such as could not pay the price exacted by the rapacity of the courtiers, it may be questioned if anything much worse is done in Tripoli or Algiers.

We have stated the separation of police from judicial functions as an essential principle in this branch of public polity. Some have thought that a power might conveniently be vested in police functions which would be an exception to this rule,—the discretion, namely, of summarily punishing certain petty offences, amounting to little more than civil trespasses, or offences of a graver character committed by very young persons. The consideration which has led to this last notion is the great evil of imprisoning boys and girls of a tender age, and thus infecting them with the vices always to be learned in jails, as well as the other evil of destroying all sense of shame by such public infliction. Let such offenders, it is said, be immediately whipped by the officer who detains them, and then discharged. This punishment, however, is better ordered judicially by the magistrate, and it may be ordered without any delay if there be a sufficient number of police magistrates. If any imprisonment is necessary, this may be ordered in such a manner as to separate the culprit from all impure association either with offenders of his own age, or older ones. Nothing could be more barbarous than a provision which should leave a watchman or patrol any discretion whatever in the matter.

We have now examined the objects of police, and the principles which ought to govern its operations.

It remains to consider in what manner those functionaries ought to be appointed to whom its powers are delegated.

1. The first difference which presents itself between this and the other department—the judicial—is that this is purely executive. The distinction is of course intended to be maintained between those duties sometimes, but improperly, blended in the same persons, and we are assuming that magistrates act merely as judicial functionaries, while all police operations are left to others. It then becomes wholly immaterial to secure the independence of these; on the contrary, they ought to be removable by the government as well as appointed by it. There is, however, no necessity for all the police of any country being vested in the hands of government functionaries. The expense of this would be enormous, and the patronage which it would vest in the executive would be exceedingly inconvenient in a popular government.

2. We proceed, then, to take a distinction between the police of the capital and the greater towns, and the police of lesser towns and country districts. The former must be left in the hands of persons wholly named by the government; the latter may, in a great degree, be entrusted to the inhabitants at large. These, at least persons of a certain station, may well, in rotation, perform the duties of constable and other policemen. The officers should be appointed by the government, and paid; the men should be the respectable inhabitants serving under these officers in rotation. That there can be no kind of difficulty in this arrangement has been fully proved by the National Guards of France. Every man of a certain age, be his rank or station what it may, and only excepting ministers of State, judges, and clergymen, is bound to take his turn and stand sentinel one, or it may be two days in the year; nor can he serve by a substitute. If drawn for the army by the conscription, he may

hire a substitute; but in the National Guard he must take his turn. Suppose, then, a town of twenty thousand inhabitants, of whom there may be two thousand men in circumstances that render them trustworthy, as householders, tradesmen, artisans. Fifteen under two paid officers will suffice to do the police duty; and this amounts to considerably less than three days' service in a year. It may, however, be doubted if substitutes should not be allowed, and this would remove every difficulty.

3. The pay of the police officers should be levied upon the district in which they serve. It may be doubted whether they should be subject to any local supervision of the inhabitants as to their removal, or whether this should be left wholly in the hands of the executive government. That the appointment should rest wholly with the government, is a position which can admit of no doubt at all. A scene of endless jobbing would be the consequence of popular appointment. If the filling up vacancies be left to the government, there may be no material objection to the inhabitants of any district, as well as the government, having a voice in their removal.

Section IV.—*Judicial System of Ancient States.*

We have by no means accurate accounts of the judicial systems in the states of antiquity. Of some, indeed, as Carthage and Bœtia, we have no knowledge at all. No accounts have reached us of their judicial system, and hardly any of their government in general. This only is known of Carthage, that all the magistrates were chosen by the people in their general assemblies, and that one consequence of the judicial and political powers of the State being blended in the hands of the same functionaries, was the usurpation by the judges (*Suffetes*) of the supreme executive authority. But we know not much more

distinctly the judicial system of Sparta; and though respecting Athens our information, generally, is more full, yet many parts of its judicial polity are exceedingly obscure, for the reasons which have already been assigned.

It appears that in none of the ancient Commonwealths was there the least attempt made to keep their judicial office separate from the other powers of administration. In fact, the distribution of justice being one of the highest offices of the chief in early ages, and hardly inferior, in point of importance, and of the power it confers, to the other office of commanding the public force, we can easily understand how little likely the separation is to have taken place until a very late period of society.

The Spartan Constitution being framed upon an aristocratic model, easily admitted a senate whose members held their places for life, and had the qualification of being sixty years of age when elected by the ecclesior, or free native Spartans, of thirty years old. The senate was composed of twenty-eight members, and exercised exclusively criminal jurisdiction in all capital cases; but it was part of the Spartan law, that though considerable delay must intervene between sentence and execution, to prevent irreparable error, an acquittal did not prevent a second trial on new evidence appearing against the accused. We are told of other magistrates, but we possess exceedingly imperfect descriptions of their jurisdiction. Thus the *Harmosynæ* are said to have exercised a censorial power, particularly touching the moral conduct of women, which, by one of the strange anomalies that composed the whole Spartan system, was one object of peculiar jealousy, at the same time that adultery was even enjoined by law in several cases. The laws never being, by another of their anomalies, reduced to writing, it is supposed that the *Homophylaces* were depositaries of legal knowledge, as well as guardians

of the law. Ultimately, five inquisitors, called *Ephori*, were appointed by annual election; they sat in judgment with the two kings on all civil causes, and had criminal jurisdiction as far as imposing fines for offences not capital, and they reviewed and punished all magistrates for oppression or malversation. For a great length of time these ephori exercised the supreme power, and conducted the government at their pleasure.

Of the Athenian judicial system we have somewhat fuller information, though many points are left obscure, from the habit of the ancient writers, to assume that all their readers were acquainted with the established institutions of their several countries. In proportion, however, as we see more of their judicatures than of the Spartan, we find the great principle of separating the judicial from the political functions infringed more flagrantly, beside other deviations from the principles which were formerly laid down. In truth, the administration of justice, as well as all the other functions of the government, was vested in the hands of the people—almost of the multitude. All the magistrates were elected by the people in their *Ecclesia*, or General Assembly, composed of the whole males of twenty years old; all except the *Areopagus* held their offices for a year: some of them were even chosen by lot; and, except the Areopagus, all the tribunals were composed of such numbers as necessarily made their proceedings tumultuous and irregular.

Of the nine archons or chief magistrates of the republic, drawn from every rank indiscriminately, the law of Aristides having abrogated the Patrician election, which Solon eighty years before established by vesting the choice in the *Eupatridæ*, six of these archons were called *Thesmothetæ*, and formed one council or college of justice; the remaining three, or higher archons, forming another. The jurisdiction of these two colleges is not distinctly known, but that of

the *Thesmothetæ* is supposed to have had cognizance of criminal matters, and matters of police. But each of the nine presided, assisted by two assessors (*Paredri*), in courts attended by persons whom the archon chose by lot, and who resembled our jurors. In four of the courts the numbers appear to have been more confined than in the rest, and these four were called *Palladii* (or *Epipalladii*), which had cognizance of wilful murder; the *Delphini*, which had cognizance of unpremeditated manslaughter; the *Euphrethemi*, which tried cases of homicide of banished persons; and the *Prytarei*, which tried cases of death occasioned by animals or inanimate objects; the *Thalattiei* tried offences committed at sea, and before the vessel anchored. The court of the chief archon took cognizance of guardianship and family disputes; that of the *Basileus Archon* tried offences against religion, and other religious causes; the court of the *Polemarch Archon* had cognizance of matters relating to aliens; the tribunal of the *Eleus* was for matters of correctional police, and had cognizance of small thefts and offences committed in the night. They also carried the sentences of other tribunals into execution.

Although the four courts which had jurisdiction of homicide in its various kinds were composed of a moderate number, only fifty-one being returned by the tribes to compose them under the presiding Thesmothete, it appears that all these might sit at once if only one such court met on any day.

The senate was at first composed of 400, afterwards of 500 members, chosen by lot from all the tribes, but subject to a scrutiny as to their qualification. However, as only an equal number of substitutes or supernumeraries, were returned, in case the others were found disqualified, we may conclude that almost all sate who were thus elected by blind chance. The jurisdiction of the body was confined to sending causes to be tried by other tribunals, and imposing fines not exceeding £15 sterling. The

Areopagus was composed of a varying number, sometimes fifty, sometimes as many as eighty-one, and the members held their places for life. All archons who had well passed their accounts, and were free from blame generally during their year of office, became members of this body, which was one of unsullied purity, and whose decisions gave great satisfaction, probably by a comparison with those of the other courts. It was the general Court of Appeal, but it could commit persons for trial before other courts. But for this court it is quite inconceivable that the system could have held together for a month.

The next in importance, the *Heliæa* or *Heliasts*, was an occasional tribunal for trying any great public cause,—any accused general or minister, or any great public question; indeed, most of the orations which remain to us on all public topics seem to have been delivered before this court. The number of its members varied with the interest excited by the case in hand; that is to say, there were more sitting as judges in this legal mob, on those causes the nature of which rendered it expedient for the ends of justice to have the fewest judges. We hear of 1,000, and even 1,200 sitting on some trials; never less than 500. The only qualification in these judges was their being thirty years of age, and they were chosen by lot. It would be exceedingly difficult for any one to devise a worse system of judicature than this. The Areopagus was the only court which did not, by its constitution, sin against every principle that ought to regulate the provisions for administering justice. It was by no means a rare occurrence for the unruly multitude who composed the court of Heliasts, to refuse to hear a person accused in his own defence. This, as is well known, happened to Demosthenes himself, when he was charged with corruption.

The defects of the Athenian system of judicature, as far as we are acquainted with its structure, thus appear to have been of the worst kind. Every one of

the principles laid down was violated, with the exception of the third. A minute subdivision of judicial business appears to have been made, and the having four courts to decide the different kinds of homicide is a singular proof of this. But here the subdivision was plainly carried to excess. Nothing can well be conceived more absurd than not allowing the same judges who tried murder to try also manslaughter, and to have a separate tribunal for trying homicides in the case of exiles.

The judicial system at Rome was not quite so imperfect, but it had also very great defects; and the confusion of judicature with both legislation and administration was its prevailing vice. The magistrates, armed with judicial authority, were originally the kings, who decided on all private, that is, all civil causes, subject to appeal, and in capital, without appeal; their jurisdiction was by Servius transferred to judges named by the senate and king. *Prætors* were soon after chosen, and inferior magistrates, who exercised a subordinate jurisdiction, as the *Plebeian Ædiles*, who had the care of certain police matters and petty offences; and the *Curule Ædiles*, who had the greater police under their jurisdiction. It was one radical vice in the appointment of these magistrates, that it was vested in popular bodies—the tribes or plebeians, who voted *per capita*, choosing the inferior ones, and the *comitia* choosing the prætor; and these, if they voted on elections as upon measures, were better qualified to choose judicial functionaries than the tribes, because their voice was given by centuries, and not *per capita*, beside that they were the wealthy portion of the community; for the four poorer classes of centuries never were called on to vote unless there was a division among those of the first or wealthy class—an event of very rare occurrence. The next great vice of this system was the annual change of the magistrate. A

third was their political functions being mixed with their judicial character. Thus, in the consul's absence the prætor was the regent, *custos urbis*. Lastly, instead of having any fixed and known law to guide them, the prætor and the curule ædile, on entering into their several offices, published each an edict stating the principles by which they should be guided—the one in his equitable, the other in his police jurisdiction; and though it is probable that these edicts, when they went beyond the *translatitious* matter, as it was termed, or the rules taken from former edicts, chiefly embodied known rules of common or unwritten law; yet it is certain that each magistrate might, in succession, lay down new rules, and that the whole taken together would in time form the body of the prætorian and ædilian law—the two great branches of the Roman jurisprudence. There was no written law indeed at all in Rome before the beginning of the fourth century after its foundation, when a meagre collection was made in ten, afterwards extended to twelve tables, partly of the old Roman laws, partly of laws borrowed from Greece.

Trials for treason, and other offences against the State, were conducted by the centuries; cases only punishable by fine were tried by the tribes. A system of appeal originally existed, which gave the popular bodies jurisdiction in the last resort. Thus, when the consul ordered any patrician to be put to death for a flagrant offence, an appeal lay to the *Comitia Curiata*, or patrician body assembled in *curiæ*. When a plebeian was so condemned he could appeal to the tribes. The same appeal was given from the sentence of the criminal judges belonging to each of the two greater tribes.

In one respect the Roman jurisdiction resembled the Athenian. The magistrate presided in the tribunal, and caused the sentences to be promulgated and executed; but the judgment was given by judices or jurors, who tried the facts of the case. These were chosen

yearly at different times, and in different ways. Till A. U. C. 620, they were taken from the senate; afterwards 300 were selected from the senate, and as many from the equestrian order. Then the plebeians returned a certain number from each tribe. Sylla restored the nomination to the senate, and it was the most important of his aristocratic reforms. After his time, when his laws (*Leges Corneliæ*) were partially neglected, the equestrian order and plebeian paymasters (*Tribuni Ærarii*) returned the judges. Finally, Julius Cæsar vested their nomination in the senate and equestrian body, the prætors choosing 450 yearly from those two orders. Sometimes the judices (or jurors), to try a particular cause, were chosen from this list by lot; sometimes one party named 100, and of this 100 the other party chose 50.

Beside the judices, each tribe chose a certain number of men, supposed to be knowing in the law; and these *Centenarii Legales* (105 in number) were consulted by the prætor on doubtful points, as the jurors were on matters of fact. If neither law nor fact was doubtful, he decided for himself. But clumsy and anomalous as this system was in other respects, it had an imperfection of a worse kind still. Justice in all important cases might be said to be administered by retrospective laws, made for the occasion, and in the heat of the moment enacted for the cause about to be tried. As almost all the measures of the government were grounded upon special laws or decrees of the legislature, even to the conferring or taking away a military command; so in like manner all great causes were tried by virtue of a special law or decree, framed for the occasion, and prescribing oftentimes the special mode in which the judicature should be constituted to try it. We have a singular example of this in the case of Milo, to try whom Pompey had a law passed directing 400 judges to be selected from the senate, the *Equites* and the *Ærarii*, who should hear the cause, and

then be reduced to fifty-one, by challenges of the two parties. This law further named a judge to preside, without holding any other office, and directed the evidence to be taken for three days; and two hours to be then given to the prosecutor, and three to the accused, for preparation. After the year A.U.C. 604, these special laws were not so constantly reverted to; previously everything had been done in this way; and even when tribunals came to be more regularly established, the interference of special laws was of very frequent occurrence: in other words, the bodies in whom the government was vested, when influenced by personal or by factious passions, made the law by which, as far as regarded the constitution of the tribunal, the cause was to be tried and adjudicated.

SECTION V.—*Judicial System of Modern Times.*

Under the Feudal System which prevailed in Western Europe, and out of which its present monarchies arose, the administration of justice was more imperfectly provided for than in any other country or times making the least pretence to civilization. The State only regarded those crimes as deserving of its cognizance, for their repression, which immediately affected the public service. Treason or rebellion was punished with death; so was cowardice. Among the Germans the traitor was hanged, the coward drowned. All other species were made the subject of pecuniary compensation, according to a scale fixed by the law. Thus, murder was redeemed by payment of a sum according to the rank of the person killed. This sum was called the *weregild* of the murdered individual. In England it was about £300 for a noble, and £15 for a serf. In France its amount was not materially different. The great majority of crimes were thus regarded as matters of private concernment, with which the injured parties alone had to do. When a more

rational and less barbarous system was instituted, and offences were punished with greater and more appropriate severity, the distinction of ranks was still preserved as far as regarded the offenders.

The trial of nobles proceeded differently from that of common persons. In some countries, as France, they could only be tried by the ordeal, that is, by the chance of their accusers being able to stand the fire or the water proof; and generally the clergy were exempt from capital punishment, being handed over to the jurisdiction of their ecclesiastical superiors, who visited their offences with tenderness, out of regard for their order.

The courts in which feudal justice was administered, were presided over by the feudal chiefs, but were composed of his vassals, who exercised the jurisdiction with him. Each barony had two courts for the trial of civil causes,—the Court Baron at which the freeholders attended, and the Copyhold Court of the customary tenants. There was a third court, the Court-Leet, for criminal and police cases, and all the inhabitants attended it.

In process of time, and very early in the system, a smaller number of the attendants upon these courts came to exercise with the chief its judicial powers, and these were the jurors, which in England alone continued to have their share of the jurisdiction. All feudal chiefs, in whatever way they exercised it, had entire judicial power, even the right of ordering capital punishment. In some countries, as Scotland, this privilege remained till a very modern period of society. In all countries, however, courts of high and general jurisdiction were established by the sovereign for the superintendence of the baronial judicatures, and these gradually ceased to hold any but an inferior jurisdiction. In England the courts of Westminster Hall were erected by William the Conqueror, in the latter part of the eleventh century; and Henry II., a

hundred years after, established the circuits, into which the kingdom is still divided,—the judges going round these, at first occasionally, afterwards twice a-year, to try all civil and criminal causes. In 1327, Edward III. established the Justices of Peace, to maintain the police and to try misdemeanours. The Parliament had originally a supreme jurisdiction over all suits except ecclesiastical, which the prelates determined with appeal to Rome. It had, at first, an original jurisdiction over all suits; records remain of a writ of right in Kent having been tried in the Saxon Wittenagemote. The appellate jurisdiction of parliament still continues; it is exercised by one of its Houses; but in point of form is supposed to reside in the legislative body at large, of king, lords, and commons,—the supreme power of the State.

In France the barons originally had supreme and uncontrolled jurisdiction, but it was restrained in the beginning of the twelfth century by Louis-le-Gros's appointment of *Juges des exempts*, somewhat on the plan of Charlemagne's *Missi dominci*, and conferring upon them exclusive jurisdiction in causes that concerned the Crown. Philip Augustus, towards the end of the century, enforced and extended this jurisdiction, so that the *cas royaux*, to be tried exclusively by the *baillies* whom he appointed, comprised treason, sedition, coining, Crown debts, together with the more important civil rights of the subject. St. Louis, about the middle of the thirteenth century, abolished trial by ordeal within his own domain, and thus led to its general disuse. He also promoted the appointment of lawyers as lieutenants of the baillies, when these were not professional men; and about the end of that century Philip the Fair had rendered it necessary for all the courts to have professional assistance,—the greatest improvement, perhaps, which the administration of justice ever received, and the change most fatal to baronial power. Still the barons retained their

judicial rights. They had the administration of justice in their hands, with the exception of cases of treason, rape, perjury, coining, and one or two other offences (*cas royaux*), and in civil suits, except questions of tithe, feudal causes, and matters relating to guardianship. But they were bound to exercise this jurisdiction by qualified judges, whom they appointed. These took the oaths to them, as the lords, who could dismiss them unless they had purchased their places, and then compensation must be made. The law required that with the lord's judge in all criminal cases two graduates should sit, or one if the lord had two judges. No criminal sentence, however, could be executed without confirmation by the parliament; and to the king's judges an appeal lay in all civil suits. Such was the high or *haute* justice; some lands had only the middle, *moyenne*, and this, except in some provinces of the Monarchy, did not extend to capital cases; some had only the *basse justice*, which was confined to disputes about rent and personal actions of small amount, and in criminal matters was only of a police kind. Originally, the vassals assisted as members of the Baron's Court; and the baillies, when established to control the baronial jurisdiction, by trying the *cas royaux*, and before their functions were delegated to lawyers, pronounced the law according to the report made by the old inhabitants—the *prud hommes*—of the community in each district—the baron, in like manner, taking the custom of the barony from his peers and vassals.

The parliaments only by degrees became the supreme judicatures of the different provinces; and then they were chiefly composed of lawyers. Presidents were first appointed in 1344. Their number varied from that period to 1643. Finally there was for the parliament of Paris one first president and nine puisne ones, called *Presidents à mortier*, who presided over the different chambers

that transacted the business. But there were also many councillors or inferior judges—and even ecclesiastical peers, and several lay peers also, belonged to the body.

The judges of all kinds originally received fees from the parties, beside the regular emoluments of their places. Various regulations were at different times made to restrain this practice, because it led directly to the grievous abuses of judicial bribery. It was only discontinued at a very late period; and the bad practice of the parties privately and separately waiting upon their judge, to solicit him, is not abolished even at this day. But the sale of judicial places of all kinds, except those of the first president of the parliaments, was universal in France. This arose from the tendency of the feudal system to make all offices private property, and hereditary, like the land, with which they were closely connected. St. Louis prohibited the sale of judicial places, but his successors permitted it. Succeeding princes made regulations to prevent the practice; but the habit was too inveterate, and the sale continued. At one time, in Henry III.'s reign, an oath was appointed to be taken by every person promoted, that he had not purchased his predecessor's resignation. But it was abolished in Henry IV.'s reign, 1595, experience having shown, that like other tests it only excluded honest men from the market. A subsequent ordinance (of Blois) required all judges to possess certain specified qualifications of age, standing at the bar, and ability. It was further ordered that no judge should be engaged in trade, or in farming any of the revenues, and that more than one of a family should not sit in the same court. After the Revocation of the Edict of Nantes, in 1685, the being a Roman Catholic was also required. Subject to these restrictions, the sale of judicial places continued down to the Revolution, 1789, excepting those of first president and attorney-general

(*Procureur du roi*). They were always inheritable, or might be sold on the death of the possessor, when possibly his representative did not possess the qualification required by law. They could be entailed, mortgaged, seized by creditors. They were subject, like other real estate, to the dower of the widow and the rights of children. Whoever purchased or inherited must undergo the necessary examination, to prove him qualified by law for holding the place he had bought. The judicial places in the provinces did not become fully recognized as private property till a somewhat later period, most of them not till 1673. A more entirely vicious system could not be devised by the art of man, or a system more likely to frustrate the whole ends of judicature.

It is needless to go into detail respecting the judicial establishments of the other feudal kingdoms. They present the same features generally, though some exhibit the defects of the system in a more remarkable manner than others. In none were the principles above laid down more flagrantly violated than in the Sicilian monarchy. Under the count, or hereditary governor of the province, there were *Gastaldi* over each district, whether town or village, and under the *Gastaldo* was the *Sculdasco*, who had jurisdiction over a hamlet or a single castle. An appeal lay from the sculdasco to the gastaldo, and from him to the count. These officers had political as well as judicial functions: they collected the revenue, and were at first employed in military commands.

About the middle of the twelfth century Roger made the baronial jurisdiction subordinate to judges appointed by the Crown, giving an appeal from both the barons and the ecclesiastical courts to the chamberlain and justiciary (*Camerorio* and *Guistiziero*), the latter being the officer of highest rank under the count. The same prince raised the importance of the judicial body as a counterpoise to the barons, with whom he main-

tained a constant and effectual conflict; thus he conferred knighthood on all magistrates. His successor, William I. (The Bad), introduced most important reforms of the judicial system. He established the *magna curia* in 1162, giving it jurisdiction over both Sicily and Naples; prohibited all judges from exercising their office by deputy; forbade all bribes for refusing or exercising the process of the court; and abolished the sale of judicial places. Frederick I., the great legislator of the monarchy, confirmed William's reforms; he finally abolished private or baronial jurisdiction, and put an end to trial by ordeal and wager of battle. The *Constitutions*, a code borrowed from the Lombard, but also containing a portion of the civil law, was his work. Peter de la Vigne, his chancellor, was the chief counsellor in these important measures.

The Spanish tyranny of five centuries restored many of the abuses which the Norman and Suabian princes had abolished; and even the judicial power of the barons was in the fifteenth century restored by Alphonso the Wise, as a bribe for their supporting the succession of his bastard son. He also introduced from the customs of Valencia, a high court, called the Council of Santa Maria, which had supreme jurisdiction in all feudal causes, and all matters touching the election of magistrates and the rights of nobility. Originally the king presided in this high court, but afterwards he delegated this office to a president. He divided the kingdom into twelve judicial circles (*guistizierati*), a court, or *udienza*, being appointed for each. All judges were removable at the pleasure of the Crown; and they only occasionally sat in public. These courts, too, united administrative with their judicial powers: they were the councils of government for the districts. From all the courts, except the Council of Santa Maria, an appeal lay to the *vicaria*, a new form of the *magna curia*, established by William I. It had various branches or *ruote:* three judges sitting in the civil, four

in the criminal branches, with a councillor to preside in each. From the time of Alphonso, in the fifteenth century, a practice grew up pregnant with the grossest abuse,—that of having extraordinary or special judges, called *delegates*, sent by the government to administer justice in particular districts, even on particular estates, and sometimes also sent to try particular causes, and commissioned to proceed, not according to the law, but to instructions specially given by the sovereign, to whom alone an appeal lay from their decisions. It is difficult to conceive any mischief more grievous than this, which seems to set all principle at defiance, and may fairly be said to have had no example and no follower. It is truly worthy of the policy of the Spanish monarchy—the most barbarous and cruel scheme of polity that ever afflicted humanity in any age! The remains of it continued down to comparatively modern times, although the practice of sending delegates was confined to criminal cases of great delinquency, or to the execution of decrees subject to no dispute.

Another barbarism peculiar to this monarchy, and introduced by the vice-regal tyranny, was the exemption of the capital from the course of the common law. Not only had it the vicaria, or court of merely appellate jurisdiction to all the provinces, for its ordinary court of justice in the first instance; but it had a law peculiar to itself in the matters of torture, confiscation, and imprisonment; and this continued down to the French invasion, 1805. All nobles, too, who happened to be born at Naples, wherever they might reside, and wherever their property might be situated, had the privilege of being tried, if prosecuted for any offence, not by their provincial courts, but by the vicaria at Naples.

It is little to be wondered at that writers of the highest authority should have painted the system of justice thus administered in colours as black as could fairly be employed in drawing the portraiture of

Eastern despotisms. Filangieri, writing a few years before the French Revolution, describes the judges of the thousand fiefs into which the kingdom was divided, as named by the lords from year to year, and giving a bond to resign sooner if required; as paid lower wages than many menial servants; as in constant league with the lord to condemn for the purpose of extorting money which they shared with him. An appeal to the Provincial Court little mended the matter. That tribunal was composed of three nominees of the Crown, removable at pleasure, and so wretchedly paid that Filangieri declares they could not subsist without corruption. Nay, the pillage of the judges is not the only evil of which he complains. They inquired into the facts of each case by agents who purchased their places, and having no fixed emoluments, lived by plundering the suitors. Their first step was casting into prison all whom they chose to suspect, often the witnesses as well as supposed parties, and then making them pay for their release. The proceeding generally ended in fixing the charge on some one too poor to pay for his escape.

When we hear the injustice of the French invasion complained off, and with good ground, let us not forget the atrocities of the system which it attacked and swept away. The proud, cruel, ignorant, and unprincipled Spaniard had been there before, and wherever his iron foot trod, all public happiness was instantly destroyed.

Section VI.—*Existing System in Great Britain.*

The judicial system established in England has been of slow growth, although the two most remarkable peculiarities which distinguish it have existed time out of mind, and we cannot trace them to their origin,—the trial by jury, and the division of equitable and legal jurisdiction. It is, taken on the whole, by far

the most commendable system of which we have any knowledge; it has fewer great imperfections; and it is more correctly framed upon the principles formerly explained, than any other, in any age or country.

1. The fundamental principle of criminal jurisdiction is, that no person can be punished for any offence, can suffer any penalty either in his person or in his property, without the judgment of twelve men indifferently chosen, and of a station near his own. Modern Acts of Parliament have introduced one exception to this rule, by giving to magistrates the power of summary conviction, and allowing them to impose a fine on the party so convicted, or even in certain cases to inflict a short imprisonment. Another exception is in cases of misdemeanour, which may, at the option either of the prosecutor or the defendant, be tried by a special jury—that is, by persons of a superior rank; consequently some offenders are thus tried by persons not near their own class in society. The power of courts to commit for contempt, looks like a third exception; and certainly it would be so unless it were confined to cases of contempt operating to obstruct the proceedings of the court. Such contempts must at once be punished, and the obstruction removed, in order that justice may be administered. If libel, or other merely constructive, and not actual obstructions, be punished by the court, not only will jury trial be withheld from an ordinary offence, but a risk of injustice will be incurred by leaving the parties injured to be judges in their own cause. The same is true of contempts, termed breaches of privilege, against either House of Parliament. If the power be assumed (as it is) of declaring by a vote of either House, any act to be a breach of its privileges, and punishing the party committing it without a prosecution, when this act amounts not to an actual obstruction, a door is opened for the greatest injustice and oppression; and trial by jury is taken away in all such cases.

The Commons have assumed to themselves the right of pronouncing what their privileges are, and what amounts to a breach of them. They do not give the community any notice beforehand of their law, but declare, that is, make it on each case as it arises. Hence men are retrospectively pronounced to have violated a law first promulgated after their act of alleged infraction had been committed. The House then punishes summarily by imprisonment; but the authority can only endure till the end of the session. Hence, when this most clumsy remedy comes to be applied on the eve of a prorogation, or a dissolution, the greatest offenders are sure of impunity. The House has then no means of vindicating its authority but an address to the Crown, praying it not to prorogue or dissolve, consequently any agent or minister of the Crown is sure to escape; and yet the main ground of the House's privileges has always been said to be their necessity as safeguards to the people's representatives against the encroachments of arbitrary power.—The Lords have assumed all the same powers of punishment, and something more; for they fine as well as imprison, and they imprison for a time certain. This, then, is strictly, and it is in form, as well as in substance, a penal proceeding—a trial, conviction, and sentence for an offence, not a remedy to remove obstructions. The Commons have some colour for contending that they punish to abate an obstruction; that imprisoning during their session secures them against a repetition of the offence. The Lords cannot pretend that sentencing an offender to pay a fine, or be imprisoned a certain time, is anything akin to such a protection of their privileges. They must allow that it is an exercise of criminal jurisdiction, and that the prosecutor, the party aggrieved by the offence, is the judge in his own cause.

In civil cases all questions of fact must be determined by a jury trial, unless where the matter belongs

to the jurisdiction of the Courts of Equity, or of Admiralty, or the Courts Consistorial. But all the questions relating to civil injury, or the title to property, or the claim to enjoy disputed franchises, cannot be tried by jury. The Courts of Common Law only decide subordinate matters upon affidavit. The main body of the cases before them must always be disposed of by a jury. The Crown, too, has the power of creating new courts to proceed by jury trial; but the legislature alone can establish a Court of Equity, or any other tribunal which proceeds without jury.

2. The separation of Law and Equity is the other great peculiarity of English jurisprudence. Originally it probably was devised in order to mitigate the rigour of the positive law; but the discretion thus vested in Courts of Equity has for many ages been exercised according to rules as technical as those of the unwritten jurisprudence which guides the common law courts. It is a more correct description of the Courts of Equity to say that they deal with questions of law different from those which the Courts of Common Law deal with. The King's Bench cannot try a real action; the Common Pleas cannot try a question of corporate right. But it would be absurd to say that these two courts proceeded upon different systems of law; although the branches of the law which they administer are essentially different, they are both courts of common law alike. So a court of equity can compel the execution of contracts and can give no damages for their breach, while the courts of common law award these damages, but cannot compel the execution. This equity jurisdiction is said to arise from the courts acting on the conscience of the party; but it is difficult to see how a man can conscientiously refuse reparation in damages for an injury which he has committed, be it of any kind whatever; and on the other hand, as much of the purpose for which courts of common law award damages is

to induce the party rather to perform his contract than pay for the breach of it. There seems little ground for excluding those courts from the simple course of at once ordering the performance. The payment of money, again, although it be the doing of an act, and may be, indeed in most cases is, the performance of a contract, is ordered by the court of law, and generally a court of equity has no jurisdiction in a mere money question; so that the division of the two jurisdictions proceeds on no very distinct or logical grounds. In like manner, when a man has contracted to sell an estate, the law giving only damages for his refusal to perform, equity alone can compel him to fully convey. Thus, a person has a complete equitable title who has no legal title at all, and whose existence could not be mentioned in a court of law as an owner. So, where a trust is constituted in any one's behalf, equity regards him as the owner, and compels the nominal owner, the trustee, to do right to him, which trustee is the only person in whom a court of law will recognize any ownership at all. In all these cases, and others of a like kind, as questions of guardianship and of lunacy, there seems no ground for the distinction between the proceedings of the two courts. But it is said that in equity the party may be examined on his oath, which at law he cannot be, at least compulsorily. Some doubt exists whether a person may call his adversary into court and examine him should he consent. But an alteration in the rules of evidence has lately opened the door for this compulsory examination of the party; and though it might always have been so arranged as that the power of examination should be mutual, and that the party instituting the proceeding be exposed to his adversary's examination, which in equity he now only is by means of a cross suit.

There is, however, a class of cases which are very conveniently confided to a separate court—namely,

disputes on matters of account, suits of creditors to administer an insolvent or an embarrassed estate, suits to administer the personal estate of deceased persons among legatees or relations, and the administration of estates of which the owners are incapacitated by law, as infants and lunatics. That all the courts could equally undertake such suits is held by some; but the sounder opinion appears to be in favour of the equity division; and the difficulty of trying an account before a jury is easily proved from the almost inevitable fate of such cases to become the subject of arbitration, after all the expense of bringing them to trial has been incurred. There is an action of account known to the common law; but it is rarely resorted to now, in consequence of the greater facilities afforded by an equity suit. The appointment of official arbitrators would, under judiciously contrived regulations, satisfactorily dispose of much that equity now almost exclusively deals with.

One of the greatest defects of equity courts in dealing with questions of fact—a far greater defect than courts of common law have in dealing with rights—arises from their having no adequate means of examining witnesses. Interrogatories are administered prepared beforehand, and in the mass, without the possibility of knowing, when one question is framed, what was the answer to the others. There is, in like manner, no possibility of cross-examination or of re-examination. The adherence to this bad course, when so much better a proceeding might be had by examining the witnesses *viva voce*, before an officer of the court, and his reporting their evidence, is astonishing. This course had long been adopted in Scotland, and with the best results, before jury trial was extended to that part of the island.* The

* The only defect which this practice left, but a very serious one, was that the judges who had to decide the cause did not see and hear the witnesses give their testimony.

argument usually urged against its introduction into English equity practice is, the chance of parties shaping their case, and forming and marshalling their evidence differently and fraudulently if, before their case was closed, they knew the adverse evidence. But not to mention that this risk might be obviated in a great degree by regulations as to time, it is clear that no kind of frauds could be practised to which courts of common law are not daily exposed, partly by the knowledge of the cases on both sides gathered from the pleadings, and partly when a trial lasts more than one day, or the whole of a long day, the witnesses being in the neighbourhood.

The mode of examination in the Ecclesiastical and Admiralty Courts holds a middle place between the Scotch and the equity practice. The examiner, an officer of the court, takes the allegation, the libel, or the interrogatories, first to examine upon each matter as stated in these documents, but then as his text on which he himself examines, putting whatever questions he conceives may tend to obtain the information sought by the statements. In Chancery the examiner can only put the questions set down in the terms written, and take the answers.

The great evil, however, of written evidence is still to tell, and it applies to the Scotch and consistorial procedure as well as the equity,—the judge who is to weigh and decide upon the testimony sees none of the witnesses. This was so strongly felt in Scotland that their mode of examination was abandoned and jury trial introduced. All these objections are so strongly felt in the English equity proceedings, that resort is had to the courts of law which proceed by *viva voce* examination; and the decision of a jury is called in, to the great increase of expense to all parties, because new advocates, as well as a new court must be introduced into the proceedings; and the better method by the jury trial takes place frequently after the worse

method by the Chancery examination upon interrogatory has been gone through.

It is one of the many evil consequences of this double system of judicature, that the judges and the lawyers are imperfectly acquainted with the learning of their art. The bounds which divide equity from law are so shadowy in many cases, and the principle of the decision so arbitrary, that to know the whole of any subject, any branch of our jurisprudence, a man should be acquainted with both equity and law. But the distribution prevents this. Thus, to take an example of daily occurrence, the rules of law and equity are the same as to evidence; yet equity practitioners, having no experience of jury trial, which alone can give a complete knowledge of those rules, are notoriously deficient of information on the subject, and they do not well deal with the evidence after it is obtained.

The great principle of the judge's independence is well observed in the English system—all the judges except the Chancellor hold their offices for life, only removable by a joint address of the two Houses of Parliament, to which the sovereign must assent,—consequently only removable by an act of the whole legislature; and there is no instance of this ever having been done. An Irish judge was once found to have been the author of a libel, for which the publisher had been convicted. He resigned his place. Another Irish judge was subjected to a long inquiry in the House of Lords; it appeared to be going against him, and he too retired voluntarily. The instances which have occurred of puisne judges being promoted have been few. They have not exceeded five during the last century. Inconsiderable, however, as this number is, we must confess it to be too great, and no promotion whatever should be possible. The hopes of it, the struggle for it, the chagrin at not receiving it, all interfere with the perfect calmness, the entire abstraction from

court intrigue, the complete independence of all party connection, the exclusive devotion to judicial duties, which ought to characterize the great functionaries of justice—the oracles of the law.

In a very great degree, too, the other and cognate principle of separating judicial from legislative and from administrative functions, is observed by the English system. The fifteen common law judges, and three of the five equity judges, as well as the judge of the Admiralty, are by law excluded from seats in the House of Commons, as are also the Masters in Chancery. None of these, except the chief-justices, are ever called to the House of Lords, although they are all capable of seats there excepting the Masters in Chancery. Lord Stowell, when Admiralty Judge, sat in the House of Lords. But the three chiefs of the common law courts, and the two chiefs of the Court of Chancery, frequently sit in the House of Lords; and one of the latter, the Master of the Rolls, generally sits in the House of Commons, when he is not a peer. The judge of the Prerogative Court is also eligible to serve in parliament, and has frequently been a member, though there is no instance of his being a peer. There is no doubt that the giving seats in the House of Lords to the three chief judges is a great departure from the principles which ought to govern the construction of the system, and it is much to be wished that it should be altered. This improvement, however, can only be effected when a better constitution shall be given to the Court of Appeal; for as long as the House of Lords is a judicial body, the giving seats in it to judges seems not any great departure from this provision of the judicial constitution—that is to say, it is an anomaly consistent with a greater anomaly—it is a departure from principle, rendered tolerable only by being portion of, and connected with, another still greater departure.

This leads us to consider that great departure from

the important principle of keeping the legislative and judicial functions quite separate. One branch of the legislature is the Supreme Court of Justice—civil as well as criminal. The House of Lords is the court of ultimate appeal in all questions of law whatever, provided they are raised on any record, and in all questions of fact, and all questions of law whatever which arise in the courts of equity. So says the letter of the constitution: the highest judicial functions are combined with the highest legislative functions; and these are together vested in judges who succeed to their situation by inheritance, with the exception of a small number of Irish peers, who are elected for life, and a smaller number of Scotch peers, who are elected each parliament. Every English peer, on attaining the age of twenty-one years, has as much voice on all these great questions as the Lord Chief-Justice of England, or the Lord High-Chancellor himself. Such is the theory of the constitution, and it may on any one occasion be made the practice. It was as nearly as possible so made on a late important political case; and on every case of this description—that is, on every case which makes the interference of the peers at large most to be deprecated—it is the most likely to happen. No gift of prophecy is required to foretell that it would take place without any doubt, were a similar occasion to present itself before the effects produced by the late extraordinary and wholly unprecedented decision in the Irish case had been forgotten.

In practice, however, all is quite different. The usage is, and for above a century has been followed with a single exception, for all but the law lords to abstain from taking any part either in questions of appeal from Courts of Equity, or writs of error from Courts of Law, or in cases of Peerage claims, which are regarded as questions of private right. Hence, only four or five of the Lords, and generally speaking

only one—the Chancellor, exercise this high jurisdiction. These call to their assistance the judges when they think fit; but we know that they do not hold themselves bound by the opinions which these judges deliver. The appeal, too, from the Lord Chancellor's decrees is heard by himself; and until very lately, he alone sitting regularly in the House of which he is speaker or president, all the appeals from himself were disposed of by himself. It is now a mere accident that any other law lords form part of this high Court of Appeal. For nine years the two chief-justices, and the chief-baron, were not in the House. Lord Eldon sat alone as Chancellor; and it was a mere accident that Lord Redesdale, having left the Great Seal in Ireland, was ever in the House of Lords. For five years he was not there—that is, from 1801 to 1806; and as Lord Ellenborough never attended, and if he had, never would have interfered on any Chancery case, Lord Eldon, during all these years, the most inexperienced of his long Chancellorship, alone sat in judgment on the appeals from his own decrees. That they were few in number may be easily imagined.

But it is not even necessary that there should be a single law lord in the House. There must be a Speaker, but he may be a commoner. I have practised at the bar of the House of Lords when the chair was filled by Sir John Leach, then Master of the Rolls, and by Sir Charles Abott, the Chief-Justice of the King's Bench. There was not one law lord present. The Speaker having no right to do more than put the question, having not so much as the right to come into the House—for his seat is not in the House at all—whatever decision was pronounced in the cause was given by any three lay peers who chanced to have come in, whether they had heard a word of the argument or not. Indeed, I myself once sat as Speaker, and heard an important case, before I had

taken my seat as a peer. There was a difference of opinion between me and the only law lord present, and I had to adjourn the decision of the case until I took my seat, and could argue the point. The decision was then given according to my opinion, in consequence of another law lord coming down to decide the question.

When we consider that this high court may thus be constituted, and in fact has often so been formed, and above all that the ordinary case is for the only judge who sits and adjudicates in it, to be a nominee of the Crown, removable at pleasure, and always a most active political partizan, surely no more needs be said to show how extremely rude this part of our system is, and how loudly it calls for improvement. But the liability of the system to be abused, the openness of the door to party influence, the certain fact of that abuse existing, the certain fact of that party influence entering—demand our further observation.

When the Prince of Wales was the real party to an appeal from Lord Eldon's decision in the Court of Chancery, in a case which interested his feelings as much as any case could do,—that is, the guardianship of Mary Seymour,—the peers attended, marshalled by their party ties and divisions. To the immortal honour of Lord Erskine, then Chancellor, no such bias was suffered to warp the judgment. Nevertheless he was the Chancellor, removable at pleasure by the king, who was known to live on the worst terms with the prince, his son; and if His Majesty had taken as great an interest as he usually did to thwart his son, the purity of Lord Erskine's decision would have been unavoidably called in question.

Again, we have lately had an instance of a great party question raised by writ of error from Ireland. Aware of this, and while ignorant of there being any nice or difficult point at all in the case, we resolved to call in the judges, and submit the case to them as our surest protection from all suspicion of a party bias.

We meant—we could mean nothing else in coming to this resolution; for if we only desired their aid, not to mention that we five had a very good right to walk alone in such a case, after our long and various experience both at the bar and on the bench. We gained no security against the suspicion of party bias if we only asked the judges questions for our own information, and refused to be guided, or indeed at all influenced by their answers. The protection which we sought consisted in our parting with the discretion, and following the opinion of the judges on the case. The judges attended;—A very large majority gave clear opinions one way; a very small minority gave more hesitating and doubting opinions the other way. Of the five law lords who alone interfered in the case, three gave judgment against, and two for the view taken by the great and undoubting majority of the judges. This majority and minority, three and two, by a mere accident of course, consisted of exactly the peers not supporters of the government one way, and the supporters of the government the other. No doubt the decision was perfectly free from all party bias; no doubt it was quite pure. Nevertheless, here was a consulting of the learned and impartial judges, and a decision against their clear and impartial opinion; and men have, however unjustly, called in question the purity of the decision, from ignorance of the characters of those who gave it. Now, justice—above all, justice administered by the highest court, the supreme judicatory of the realm, and most of all, administered in a case of a political and a party kind—ought to be not only wholly pure, but wholly unsuspected.

The extraordinary difficulty of giving a good constitution to a supreme appeal court is admitted on all hands; and it is no reason against making the structure of it as perfect as possible. The present court is very wide indeed of any conformity to the principles which ought to regulate the construction of judicial tribunals;

and it may safely be affirmed that no substitution which is at all likely to be formed for it would be by many degrees equally defective. The evil consequences of removing its judicial functions from the House of Lords, are commonly given as the chief reason against any change. But surely it requires no argument to prove how little respect or weight can be claimed to that House for a merely nominal judicature, as it now is in the hands of its members at large. Nay, anything less consistent with the dignity of the House as a tribunal cannot well be conceived than the arrangement by which it tries causes. Three peers are a quorum, consequently two in rotation sit in the morning with the Chancellor, to secure a sufficient number for the transaction of judicial business; the attendance of the law lords, when there happen to be any in the House, or in London, is of course merely accidental, and can never be reckoned on. There is a cause begun to-day before these two lay peers sitting with the Chancellor; it is adjourned till to-morrow, when other two attend; a third pair hear the end of the cause on the third day of the argument; and a fourth pair, which has not heard one word on either side, attends to give judgment. Can anything be imagined worse than this arrangement, which has now lasted more than thirty years, and was instituted as an improvement for the despatch of business? Can anything more strikingly demonstrate that the attendance of the peers in judging causes is always dispensed with except as a mere form? Or can anything more clearly prove that the judicial functions of the House are merely nominal? But also, can anything more strikingly show that the present system is wholly inconsistent with all notion of the House's dignity being increased by its judicial character? It may safely be affirmed, that in no country was there ever exhibited a more undignified spectacle than the one which has just been described,

and which has constantly been seen in the Lords House of Parliament.

When we consider the difficulties already stated of finding judges for a court of appeal, who shall at once be qualified, from constant practice, to discharge the duty, and be able, from leisure, to attend the sittings, we must at once come to the conclusion that a compromise is necessary to avoid the opposite evils of too little practice and too many avocations. But to give weight to the decisions of such a court, their having once held, or still holding, high station in the profession of the law, is also a necessary qualification in most of the appeal judges. Regard being had to these considerations, let us try if something may not be devised to suit the exigency of the case, and to approach, if not to attain, such a solution as may agree with the general principles. A court of fifteen judges might be thus composed. Nine of these might be either retired judges or lawyers, well qualified, by their learning and their practice at the bar, to preside over an appeal court—men fitted to inspire respect for their admitted capacity and learning, and as regards the greater number of them, from their formerly having held high legal office. Of the remaining six, three should be judges actually on the bench, and daily in use to decide cases of all kinds, one being taken from each Common Law Court. The remaining three should be equity lawyers, and, if possible, one or more of them men who have already held, or who still hold, judicial stations in the Consistorial Courts. The universal testimony borne to the excellent working of the Judicial Committee for Appeals in Colonial, Admiralty, and Consistorial causes, shows the expediency of retaining that appellate jurisdiction on its present footing, and also of taking its construction as an example.

Nothing can be more fit than that some of these judges should be peers, as long as it is deemed

necessary to have the Chancellor and one or two chief-justices in the House of Lords; because, otherwise, the bench of the Appeal Court would not be accessible to those who had formerly been superior judges, and had peerages. But if this practice is abolished, as it ought to be, the reason ceases; and if it is not, then whoever takes his seat on the appeal bench should be disqualified from exercising any of the functions of a peer. The judges of appeal must be rigorously excluded from all connection with legislation, with administrative duties, with politics, with party. It is not easy to see any insuperable difficulty in forming a good appeal court on some such plan as that now roughly sketched.

In any such change as we are now contemplating, there would be no occasion to strip the peers of their judicial functions altogether. Trials of impeachment ought to be left to them, and trials of their own members for felony. But the mode of proof on these trials should be materially altered. There is no one question which the peers at large are so unqualified well to try as a political offence—the guilt or innocence of a government or a minister. Their own members, too, would have better chance of justice if they were tried in another manner. The whole members of the House might be the body whence the jury should be taken, subject to challenge in each case, and the Speaker of the House or the Chief-Justice should preside.

The judicial force of the English bench is abundant as regards the higher places. But there is a want of inferior functionaries to preside over the magistrates at sessions, and hold local courts, subject to appeal on points of law. This is an evil so much felt, and so generally admitted, that the attempt often made, and once nearly successful, will, in all probability, before many more years elapse, be revived, and one of the greatest practical defects in the system be removed.

The defects in the English police system are still more serious than in the department of final judicature. The executive and judicial functions of the police magistrate ought to be kept entirely separate; and the privileges of corporate towns ought to be swept away with a bold and unsparing hand. Nothing can be more repugnant to all principle than elective judges; and yet the municipal bodies, being themselves elected, choose their judicial officers in some of the most important stations. It is enough to note London itself. So high judicial functionaries as the Recorder of London and the Common Sergeant are elected there, and the inferior magistrates are all elective. The Recorder is chosen by the aldermen, and the Common Sergeant by the Common Council, voting irresponsibly, because voting by ballot. Nothing can bring a greater disgrace on the judicial system than this flagrant abuse. But each alderman chosen by the livery, of whom there are eight or nine thousand, is himself a magistrate; and hence scenes often complained of, to the scandal of the whole community, are too frequently enacted before these inefficient and indiscreet courts of police.

But the great defect of the police system is the want of a public prosecutor. Upon this subject enough has already been said in explaining the general principles.

With these exceptions, and subject to these observations, the judicial system of England deserves the praises generally bestowed upon it, as departing less from sound principle than that of any other country in Europe.

The judicial system of Ireland is substantially the same with the English. The Scotch differs widely, being in some respects better, in others worse. There is none of that separation of equity from law, on which we have remarked as a blot on our jurisprudence. The trial by jury, only of late introduced

in civil causes, is not so well arranged, nor by any means so perfect as in England, where its universality has been long established. The not requiring unanimity in the jury's verdict, although on a superficial view of the subject it may seem better, is in practice found to produce hasty decisions, from the impatience of jurors to finish the trial; while in England the requiring unanimity has the effect of compelling the fullest consideration of each part of every case. The number of judges is, perhaps, still too large in proportion to the judicial labour required, and the powers of the bar to furnish able judges; but thirty years ago, instead of thirteen, there were twenty; and this diminution is a great improvement. The promotion of judges seldom takes place, now that the distinction of justiciary, session, and jury judges is done away. Formerly, it was a regular thing for a person (often of very slender qualifications) to be made a Lord of Session, or civil judge; after some years to be promoted, and made also a Lord of Justiciary, adding the criminal jurisdiction and salary to his former functions and emoluments; and afterwards to be also made a Jury Court Judge, with more duties and more pay. All this bad system of promotion is now happily at an end.—The judges are not, as in England, appointed by the Chancellor, in his capacity of Minister of Justice, but by the Home Secretary. This is a very great anomaly; it is contrary to all principle, and ought immediately to cease. No new law is required for the purpose; it may be at once and for ever corrected in practice.

The jurisdiction of the sheriffs of counties, as judges in ordinary within their districts, in most causes, is a very great advantage of the Scotch over the English system. He is generally a lawyer of sufficient skill and learning; he practises, for the most part, at the bar of Edinburgh; and he is bound to reside four months yearly within his bailiwick. He has a deputy

(the sheriff-substitute), an inferior professional man, to act in his absence, and from whose decision an appeal to himself lies. Thus Scotland has a system of local courts, which only wants a little improvement, especially as to the longer residence of the judge, to make it perfectly satisfactory.

The criminal law of Scotland has at all times been greatly superior to that of England in its administration, though not in its structure. It is too severe; and, as by the principle of Scotch jurisprudence, statutes, after a lapse of years, fall into desuetude, a code is more wanted there than in England, for the important purpose of fixing and declaring the law. But the institution of a public prosecutor is a most inestimable benefit to the administration of this law, as we have already seen. It may be observed, too, that at all times the Scotch have allowed the counsel for prisoners to address the jury on the whole case,—a benefit which has only of late years been introduced into the English Courts. There lies no appeal, however, from the Scotch Criminal Court to the House of Lords; and this is a manifest defect in the system.

The French judicial system has received very great improvements since the Revolution. It still is defective, but the greatest of its old imperfections are now remedied. The first change, and the most important, is the carrying into effect the plan, often before conceived, and at one time resolved upon, of reducing the whole laws of the monarchy into one system, and extending it over every part of the kingdom. The worst of the evils under the feudal regimen had long ceased. There was no longer, as in the earliest times, a personal law; that is, subjects of different races, living under different laws even, choosing the code they should be governed by. Nor was there the evil, which survived for many centuries, of the various customs being for the most

part unwritten, so that the report of the neighbourhood (*Enquête de Tourbes*) was resorted to as often as a question arose. This proceeding had been superseded by the judicial report (*Actes de Notoriété*), introduced late in the seventeenth century; and between the middle of the fifteenth, when the work was begun, 1453, and the beginning of the seventeenth, when it was completed, 1609, a full compilation of all the sixty general customs under which different districts lived had been made. But there were about three hundred particular customs, applicable to different towns and villages, and varying even in the same town, and these were still to be ascertained by *Actes de Notoriété*. Louis XI. had resolved to introduce a general law, prompted by the progress then making in the compilation first ordered by Charles VII. in 1453. But three centuries and a-half elapsed before this good work was executed; and with it the almost equal benefit was conferred on France of a complete code or digest of all the laws. In compiling this great work, the Council of State, as we have before seen, had the assistance of the civil code, begun by the government in 1793. But the penal code, and the code of procedure, as well as of commerce, were entirely new works, first undertaken by Napoleon, and absolutely necessary to perfect the digest. It has been the source of solid benefits to the country, and the subject of loud and just applause from all statesmen and all lawyers whose opinion is of most value.

The abolition of feudal jurisdiction, and vesting in the executive government the appointment of all judges, is the next grand reform which France owes to the Revolution. The more important of those places, all but the *juges de paix*, are held for life, or until some offence is committed, and the party convicted of it.

A due attention is paid to the police department,

and public prosecutors everywhere are ready to superintend the institution and preparation of proceedings, and to see that the law is enforced. Though removable, the practice is not to displace them, unless on some very extraordinary occasion. On a mere ordinary change of ministry they are not changed.

The number of judges is ample, and there are courts established everywhere, so as to prevent the suitor being harassed by the expense and delay of resorting to distant tribunals. Justice may truly be said to be brought near to every man's door. But there is a general superintendence exercised over all the tribunals by an appeal on any matter of law, whether civil or criminal, to the great central court, the *Cour de Cassation*, first introduced under the republic, and now continued with some improvements. Under the republic it consisted of about sixty members, of whom one fifth went out yearly, and the electoral assemblies chose the members, the executive government appointing a commissary with two deputies to represent them. There was then also a High Court of Justice, for the trial of great impeachments. It consisted of five members of the Court of Cassation, and eight jurors taken from a list of eighty-four, chosen by the assemblies of the departments. Even under Napoleon, the judges of cassation and *juges de paix* were not at first named by him, or removed at his pleasure; only the president was his minister of justice. But in the progress of his usurpation, he assumed the appointment of the whole court, exercising the power through the senate. That important tribunal now consists of forty-eight counsellors or judges, all named by the Crown, and irremovable. There are three chambers; each chamber has a president; and there is no doubt that the members of the court generally are persons of learning and skill, but they are not always men of much note in the legal profession. Yet it is said that its decisions give general satisfaction, and that the

respect necessary for enabling a judge well to execute his high office, attends them as soon as they are elevated to the bench. They do not discuss in public, but they congregate in the centre of the hall after the argument is closed, and deliberate, standing together, on their judgment. If the case is not clear they postpone the decision, and one or other—generally the first president (there being two)—gives it. When they differ, each is heard to state his opinion. The large number of the judges is not found to be inconvenient, and it is supposed to give their decisions greater weight with the profession. None of them can hold any other office, but they are not excluded from seats in either chamber of the legislation; no more are the inferior judges.

The separation of the judicial from other functions is thus most imperfectly provided for in this system. Judges of the higher courts in the departments are frequently members of the Chamber of Deputies. Nay, instances have been known of the supporters of a judicial candidate for the suffrages of electors, warning them of the risks they ran should they vote against the judge, and afterwards have a cause to try before him. Nothing can possibly be more indecent; but also nothing can be more certain than such language, if the judge be allowed to canvass for votes by himself or his faction—that is, if he be eligible to the chamber.

In another particular there is the same union of judicial with other functions. The High Court of Justice under the republic is abolished; but the peers try cases of a political nature; not only ministers, when impeached, but persons charged with treason. The whole of the peers in these cases interfere as they do with us. The same remarks apply to this tribunal as to our own, with the additional objection, that the cases to which the interference of the peers applies are not so well defined as with us,—a special decision of the peers directing in each case this mode of trial.

But in another and equally important particular the French system errs against the fundamental principles. The judges are too numerous, and their salaries are too small. The arrangement is this,—each canton is under a *juge de paix*, who has jurisdiction in petty cases, final as far as two pounds, and subject to appeal as far as four. They have likewise summary jurisdiction in disputes as to tenant's repairs, servant's wages, and bounds or landmarks of property. They exercise a police jurisdiction, punishing for the smaller offences, as far as fifteen francs fine, or five day's imprisonment. The mayors of towns or communes have a like jurisdiction. They are, moreover, judges of *Reconcilement*, and all parties must first summon their adversaries before them, when a suit is brought in a superior court, in order to see if it can be amicably settled: a most admirable and valuable law, which tends greatly to prevent useless and oppressive litigation, and to check the malpractices of professional men. In Denmark, where it is better established than anywhere else, four-fifths of the causes begun are dropt in consequence of this excellent institution.

As there are 2,834 cantons in France, and as there are several *juges de paix* in the larger or town parishes (communes), though there are several communes in each country canton, there are above 3,000 of these *juges de paix*. Their salary is only from thirty to forty pounds a-year, and they are chiefly attorneys or retired barristers. They are removable, but in practice not removed. In every arrondissement, and there are 363 in all, there is a tribunal *de Première Instance* composed of three or four members, and in the most populous districts, of six, seven, or eight. They are the ordinary tribunal, deciding, without appeal, on all cases not exceeding £40, or £2 of income; and subject to appeal in cases of greater amount. They have salaries of £80 a-year, and their numbers considerably exceed £1,500. These courts are divided

into chambers; and one of them is a court of correctional police (*Police Correctionelle*), punishing for offences (*délits*) less than crimes, where the imprisonment is above five days, or fine above fifteen francs, (the jurisdiction of the *juge de paix*), and which do not amount to what is called *peine afflictive* or *infamante*. They can imprison for as long as five years; but cannot either punish capitally, or send to the galleys (*travaux forcés*). The appeal in greater civil suits, and in criminal cases, lies to the *Cour Royale*, of which there are twenty-seven in different districts, composed of several departments each. Beside its appellate, this court has original jurisdiction in cases of graver offences (*crimes*), and one of its sections finds the bill as we should say, that is, decides on putting a party on his trial, (*mise en accusation*). The salaries of the judges in the Cour Royale vary from £100 to £300; generally speaking, the junior judges have £120, and the president or chief £200. The number of judges varies with the importance of the district,—generally four or five; but that of Paris has fifty judges, that of Lyons twenty-five or twenty-six; and there are nearly 900 in all. The *Cour d'Assize* consists of three, four, or five judges of the Cour Royale, taken from that one of its sections which did not commence the criminal proceeding, or determine the *mise en accusation*. They try with a jury of twelve, which decides by a majority of votes; but if there be only a bare majority of seven to five, the case is reconsidered by the judges, and the conviction only takes place when, of judges and jurors united, there is a majority against the prisoner. The Court of Cassation has three chambers, each under a president; one chamber, called *de Requête*, examines the competency of the appeal, another tries the civil, and a third tries the criminal cases; there is a premier president who presides over the whole. Beside its appellate jurisdiction, this court tries questions of dis-

puted jurisdiction between inferior courts, and it can suspend judges for misconduct, as well as call them to account before the minister of justice. Its members have salaries of about £700 a-year, the president £1,000.

In each tribunal *de Première Instance* there is a Procureur des Roi; in each Cour Royale a Procureur-General. These officers act as public accusers, and they represent the Crown and the State. There was, for a few years, a trial made of grand juries; but it failed, and their functions were transferred to the Cour Royale.

We thus see, that beside three thousand *juges de paix*, there are nearly as many superior judges,—in all, above five thousand, and that the salaries, even of the latter class, are exceedingly trifling compared with the vast importance of the duties which they perform.

Compared with the number of functionaries who administer justice in England, or in Scotland, this appears quite excessive. Take Scotland, where there are local courts, and we find in all the country only sixty-six local judges, and thirteen of general jurisdiction; these seventy-nine belonging to the higher class, of which in France there are between two and three thousand, beside the one hundred and sixty courts to decide commercial questions. Yet the population of the country is not above tenfold that of Scotland; so that there are above three times as many judges in proportion; not to mention that there is no occasion whatever to increase the judicial force in any exact proportion to the numbers of the inhabitants. Again, in England, were there local courts, there would only be about one hundred and ten judges of the higher order; and suppose them increased, in the proportion of the population to that of France, the whole would only amount to two hundred and twenty-five, being less than one-tenth of

the French judicial establishment. It is true that much of the criminal business in England is transacted by the quarter-sessions; but suppose there were, as there ought to be, a paid chairman for each county, the proportion would still be seven or eight times greater in France than in England. Now, we may safely affirm that this is a much larger number than the bar can furnish of persons qualified by learning and experience for the judicial office. We have also to consider how great a relief to the higher tribunals, civil and criminal, is derived from the body of three thousand *juges de paix*, whom we do not take into our account at all in forming this comparison; and yet all of them are paid functionaries, and mostly professional men.

On the other hand, when we regard the emoluments of these functionaries in the two countries, there is no kind of comparison; the few English judges, the 110, cost more than all the vast number of 5,000 French; for the yearly expense of the judicial establishment is £1,325,000; that of France £760,000; so that, supposing Scotland and Ireland to cost half-a-million, which is above the truth, the English establishment alone costs yearly between £800,000 and £900,000, greatly exceeding that of France. A judge of the superior courts in England receives £5,000 a-year; a chief £8,000. In France the Cour de Cassation is paid six times worse, and the Cour Royale five-and-twenty times worse. This is one consequence, and it is the very worst, of the far too great number of French judges. Were they only paid half as well as the English, to make allowance for the greater cheapness of living in France, the expense of the higher tribunals, omitting that of the *juges de paix*, would amount to five millions and a-half, instead of being under half-a-million sterling. No country could bear so enormous an expenditure for this one item, all important as it is to the country.

But the alternative to which they are driven by the

excessive number of their judges is most hurtful to the due administration of justice. The government has not the choice of the first talents and greatest learning in the profession, for the appointment of the magistrates who are to administer the law. A barrister can earn £1,500, and as much as £3,000, £4,000, or even £5,000 a-year by his profession. To offer him a place even in the Cour de Cassation with £800 a-year would be ridiculous, unless, indeed, he had lost his practice by losing his faculties. But who would be found to give up even the humble emoluments of the most ill-employed advocates for £120 or £200 a-year, with a certain station to support. Accordingly, it is found that no person will take the situation even of judges in the Cour Royale, much less those places in the Cour de Premiere Instance, unless he have either wholly failed in his profession, or is possessed of some private fortune, and desirous of holding the place on account of its rank and dignity. The defence made for the low rate of salary when the subject is discussed with French statesmen or lawyers, is the facility given to make respectable appointments by the private fortune or the expectaries of lawyers independent of their profession. But to this the answer is obvious. The first-rate talents, as far as these are evidenced by professional eminence, are by the defence admitted, and at once admitted, to be excluded; they are beyond the powers of the government to command. This is bad enough; but it is also clear that the defence makes another admission; the choice is further limited. For no man can afford to be promoted and placed on the bench who has not a private fortune. Now, it is certain that while men wholly incapable may possess this qualification, men the most capable may be altogether without it. Nothing, then, can be more clear than that the excessive numbers of judges is most injurious to the composition of the judicial body, both by affording a greater demand for judicial labour than the bar can supply, and by holding out a less

inducement than is sufficient to obtain as good help for the bench as the bar can afford. The supply is inadequate to the demand, and the price is below what is wanting to obtain the supply, such as it is. The system requires more than the market can furnish at any price, and it offers a price lower than the prime articles in the market costs.

The line and course of procedure is the worst part of French jurisprudence. It is as bad as possible.

The judicial system of the United States of North America, in its principles, resembles that of England, as the law of the country, both civil and criminal, is the English law, unless in so far as it has been altered by the American legislature, chiefly as to the conveyance and descent of real property, and the amount of punishment for certain offences. The law of primogeniture could not well exist in a democracy; and accordingly an equal division of land on the parent's death is generally the rule, without, however, preventing, as the French law does, the owner of a fee-simple estate from leaving the whole, or a greater part, at his pleasure, to one son, as he may to any other person. Capital punishments, too, were restricted in number at an earlier period than in England.

All judges are appointed for life, and can only be removed by an impeachment and conviction, in which case the president has no power of pardoning. There is no appeal to the Senate or Upper House, as with us; and there is a complete separation of the judicial from the legislative, as well as the administrative functions in the State. It is to the Supreme Court that the appeal lies. This is composed of a president and six associate judges; and there is a court in each State called a District Court. The salary of the president is 4,000 dollars (about £900), and that of the

associates 3,500 dollars (between £700 and £800); the salaries of district judges vary from 800 dollars to 2,000 dollars (£200 to £450), emoluments certainly too low when we consider the high profits of labour in America, and that the judges have no retiring pensions. A most absurd rule is established in the Federal Court: judges cannot serve when turned sixty years of age—that is, when their judicial capacity is greater than at any former period of their lives. In England, Lord Eldon was as eminent a judge at seventy-six as ever he had been in his life. He presided in the Court of Chancery and House of Lords for sixteen years after he must have retired by the American law. With this exception, and that of under-paying judicial labour, the American system is superior to our own. The peculiarity of the courts deciding whether or not any given law of the State is binding, for want of form in passing it, as well as for its repugnance to the principles of the Federal Constitution, we have elsewhere explained at length, and illustrated by decided cases.*

* Appendix No. II.

NOTE REFERRED TO ON PAGE 321.

The Judicial Committee proceeds partly according to the provisions in the statutes respecting it. But when I established it, in 1831, I proposed a course of proceeding which was adopted, and has generally been followed with very good effect. The judges, four at least, and there are seldom more, take the causes in rotation as virtually presiding, and each in his turn thus draws up the judgment with the reasons, and communicates it to the others, who make such alterations as they think fit; and when all are agreed, it is delivered as the judgment of the court, or if they differ, as that of the majority; but this has very rarely happened. Occasionally, but most rarely, there has been a second hearing. In point of form it is the decision of the Sovereign, to whom it is reported for approval.

CHAPTER XX.

THE MILITARY SYSTEM.

The public defence in rude nations is easily provided for. The whole community are warriors, whether they live in the earliest stage of society, the hunting and fishing state, or in that which is but little removed above it, as regards civilization—the pastoral. The chiefs are the rulers in peace, and the leaders in war; the whole tribe takes a part in all operations.

But though these two states of society may not be far removed one from the other in date and in refinement, they stand at a mighty distance asunder in their military resources. The huntsmen can never bring any force into the field; they are necessarily few in numbers, and scattered over a large territory; they cannot support themselves in a campaign of any duration; they must quit the war for the chase in order to subsist; hence with them a war consists of a single inroad, and a fight or two; and they never can be formidable to any neighbours more civilized than themselves. It is far otherwise with a nation of shepherds. They may have as many numbers as their herds and the plains they feed on will support; their life is necessarily not fixed like the huntsmen, but wandering; and when they have eaten up one district by depasturing it, they move onward to another. When they take the field, which they are prone to do in quest of other pastures, they bring their subsistence with them, being accompanied by their flocks as well as their families. Hence the prodigious bodies which have at different times ravaged the countries both of Europe and Asia, near the Tartar and Scythian tribes,

both in ancient and in more remote times. They have warlike habits, too, as well as large numbers and ample resources; for their lives are spent in the open air, they are inured to every vicissitude of weather, and their sports are of a manly, and even a warlike description. Dr. Smith says, that the opinion of Thucydides has been confirmed by all experience, and he represents that great historian as saying, that if the Scythians should unite, "both Europe and Asia could not resist them."—(Book v., ch. 1, vol. iii., p. 47.) Thucydides, however, does not say so. He only says that were they united, not only no nation in Europe, but no Asiatic nation either, could singly stand against them,*—a proposition which it required certainly no experience nor any argument to prove; for it is nearly a truism to say that no single nation could resist the united force of many. However, no doubt can be entertained respecting the great force of numbers, as well as of savage, though undisciplined valour, which the shepherd hordes could always bring into the field. They conquered China, Turkey, and a part at least of the Western Empire itself.

The habits of husbandmen are less adapted to war than those of shepherds, but much more so than the habits of artificers and traders. They can in a rude state of agriculture absent themselves from labour during a part of the year; and their work in the open air, under all weathers, is calculated to make them hardy, while they are naturally frugal, and easily bear privations. As agriculture advances they can no more leave their fields than the artificer can his workshop. Wherever this is the case, and the rest of the people are engaged in handicraft and in traffic, some arrangement must be made for the public defence, founded upon a division of labour. Men must be hired to fight for the community, and to defend those who

* Οιχότι ταὲν τῃ Ευρωπῃ, αλλ'ὀυδ'ὲν τῃ Ασιῃ εθνος ἐν πρὸς ἐνουχ'εςιὸ τι υνατον Εκυθαις ὁμογνμρον ουσι πασιν αντιςηναι —(*Hist.*, lib. v., cap. 4).

are working either in the fields or in the towns. A class thus arises which in a rude state has no separate existence—a military class, as contradistinguished from the civil classes of the community.

But it has happened that in other stages of society, not only in the earliest, but even in very refined communities, this separate class did not exist. In the states of antiquity war continued so long to be the most important and dignified occupation, that the whole people were trained to arms. Reading and writing do not form more essential branches of education in our times, than martial exercises did in Greece and Rome. All freemen between certain ages were bound to serve in the army when called upon; and all youths were trained with a view to taking their part in the service. At Rome, every man between seventeen and fifty was liable, though the young were preferred as more active and more docile; and the world was conquered, as has been said, by boys. In Greece, the case was the same, till Philip of Macedon first introduced a separate class or caste of hired soldiers. This improvement in military policy enabled him to conquer both Greeks and Asiatics; and his son carried his arms still farther, by imparting discipline to his troops. The Carthagenians gained their first victories over Rome by having a large regular army of mercenaries, differing from the Macedonian in this, that it was composed of all nations, African, Asiatic, and European; while Philip and Alexander only enlisted Greek soldiers. The feudal monarchies furnish another instance of nations far advanced above barbarism defending themselves, and invading their neighbours, without regular troops; for the feudal system consisted in the tenure of all land being by the rendering of military service; and every person possessed of any land was bound to take the field when required, and his followers were bound to attend him, though this very imperfect scheme only required those

troops to remain on foot for a certain time. Hence it became necessary to take a money payment instead of this actual service, and to hire troops who could be relied upon beyond a few weeks.

In like manner the Turks have a kind of feudal militia, to which, for some ages, they trusted for their defence. The Zaims or Zaimar granted to individuals by the Tartar conquerors of the Eastern Greek Empire, were held on condition of furnishing so many men in proportion to the extent of the grant; but the force thus raised was not under the command of the landowner, the Zaimot or Zaimariot, but officered by the governor, and so far differed materially from the feudal militia.

With these exceptions, all civilized nations, and all nations in modern times, have maintained a class of men under the orders of the government, paid by the government, and devoting themselves exclusively to the military profession. Hence standing armies or regular troops have arisen in the world, and have become a most important part of the establishment in all countries. Even the Turks were obliged to give up their feudal militia, and in the fourteenth century established (under Amurath I.) their Janizaries, which were their first regular army. All the European nations, without any exception, had recourse, at an earlier period, to the same plan.

The grounds upon which this institution rests are two. In the *first* place, it is necessary that some men should, in every community, be paid for undertaking its defence, in order that the great body of the people may be enabled to labour in their several peaceable vocations. This makes the employment of an army, for defence, a matter of necessity. But, *secondly*, it cannot be expected that men who have other occupations, and who only are soldiers for a part of their time, should be so expert in the use of arms, or so well inured to the fatigues of a military life, as men whose whole time or attention are devoted to military affairs, even

if they should be as courageous in actual war. Now, as the danger would be very great to all their welfares, if one or two States trained their armies in the way to make them most efficient, that is, most formidable, it is evident that all others are compelled, in self-defence, to follow their example, as, indeed, they also are, to adopt all the improvements successively made in military discipline, and in the art of war.

If a standing or regular army is not maintained by any country, the only course left to be taken is to have a good militia, that is, a certain portion of the people called out in turn to learn the use of arms, and form the public force. But this kind of force is liable to both the objections already stated. Its formation gives interruption to the ordinary labour and pursuits of the community; and it never can become very expert in the operations of the military profession. If, indeed, it is kept on foot, that is, if the same persons are retained under arms and discipline for a year or two together, as happens to the militia of some countries, there is no difference whatever between them and regular troops. Some of the greatest things ever done by the English army were performed by militiamen drafted into the regular forces, and volunteering to serve abroad. They had been for some years embodied, and were not in any way distinguishable from the regular forces. It is related that a great proportion of the soldiers who fought at the battle of Talavera had come out to join the army in such haste, that they had the names of the militia regiments to which they had immediately before belonged, still marked on their accoutrements.

Extreme opinions have been entertained by men of opposite political principles respecting the maintenance of a standing or regular army in time of peace. No one denies that, in war, it affords the only safe means of national defence; but many hold, and justly hold, it as dangerous to the liberties of the people that their rulers should be entrusted with a regular force in

time of peace. The amount of this danger depends upon two circumstances—*first*, the excess of the force over and above what may be required for maintaining garrisons at home, and in the foreign dominions of the State, and for keeping up a staff of commissioned and non-commissioned officers, and a sufficient body to discipline the new levies should war break out;—*secondly*, the manner of appointing the officers—that is, whether the army is officered by men of station and influence in the country, or by foreigners or persons of no rank, no responsibility,—the ready tools of a prince desirous of absolute power. Dr. Smith, fairly enough takes the second of these circumstances into his account; but he altogether undervalues the first. Now, it is evident that, although the army be composed of natives, and although it be officered by men of rank and property, or their connections, yet the effect of discipline, of the habits acquired in service, is to make all, however connected with the country, lean towards obedience, and even obedience without any inquiry or any reasons. They are accustomed to obey those over them. They dread nothing so much as mutiny; and they never can act in any concert to resist an unlawful command. Therefore, great risk is incurred by any people, of encroachments upon their liberties, if a larger disposable force is left under the control of their rulers than is absolutely necessary to maintain the military positions of the country, and provide for the emergency of war.

Dr. Smith overlooks this consideration. He even resorts to a somewhat singular argument in favour of a standing army as conducive to freedom. He says that it gives the sovereign a security that makes the jealousy unnecessary which, in some modern republics, disturbs the peace of the citizen by watching over his minutest actions (Book v., ch. 1). Where he must suppress and punish every murmur and complaint, tumult may bring about a great revolution, he says, from the want of a sufficient force to crush it;

whereas a sovereign, well supported by regular troops, can afford to tolerate a degree of liberty which borders upon licentiousness. This is plainly an argument in favour, not only of standing armies, but of slavery, and of slavery in every form—domestic as well as political. It not only goes to make men abandon all their political rights and liberties, and all the safeguards for them, but to embrace the lot of the serf or even the slave, in preference to that of the domestic servant. For the more despotic any prince is, the more above all control from popular assemblies, or other free institutions, the better can he afford to overlook discontent, and even to bear with insolence, which he knows he has the power instantly to crush. So, the owner of a slave will give him more license than the master will allow his servant.

It seems not very easy to arrange the defensive system of a country so as to place liberty in no danger. The merely placing the pay and the command of the army under the control of the people's representatives, is manifestly no sufficient security for the rights of the people, because the force which arms the prince's or the executive's hands may be turned against the representative body itself. Cromwell turned out of doors, by means of his soldiery, the Parliament which had both overthrown the old government and embodied that soldiery. The Executive Directory of France, in 1797, expelled and then banished, by their troops, a third of the legislative body, when its members appeared disposed to take counter-revolutionary and anti-republican courses. Napoleon, by his soldiers, cleared the hall of the people's representatives, when he was minded to overthrow the Commonwealth by whom those soldiers had been raised and paid. The political check retained being upon paper and in speculation, while the physical force entrusted is effective and in fact, it is easy to see which power will go to the wall if a conflict occurs. Therefore, a regular army is attended with danger, and ought never to exceed the demands of garrison service, colonial service, and that which the

keeping up of discipline requires. But still, a great force may always be safely prepared, and well relied upon, without breaking through this rule.

It appears to be the duty of every government to see that all its subjects are trained to the use of arms, and the habits of discipline. This can easily be effected by calling upon them to be drilled for a few days every year. Nor is it necessary to call them out, or to drill them during a whole day. They may be disciplined and taught partially by three or four hours' exercise for a week, which will but little interfere with their ordinary labour. But a certain portion should be called out for a week yearly, in rotation, and in different parts of the country at different times. If in England there be three millions of able-bodied men of military age, that is, between eighteen and fifty years of age, 400,000 could easily be called out for a week, once in seven years; and no hardship would be inflicted, certainly none at all comparable to the relief from expense gained by dispensing with many thousand regular soldiers, and the security to liberty arising from the diminution of the standing army, as well as from the armed state of the people.

But are there no dangers to be apprehended from an opposite quarter if this course should be taken? Is it safe to discipline all the people, and thus give them power where an evil use may be made of it? Doubtless, it is the first duty of every government to preserve the public peace, and prevent all revolt against its authority, all violent changes in the established order of things. This, too, is its paramount duty, and to which all other considerations must yield. If, then, the people are in so uninformed a state as that it would be dangerous to trust them with arms, for fear of their combining to overthrow the existing institutions of the country; if they are so ignorant as to desire the very event most fatal to their own interests, the institution of anarchy by violence; if they are so easily led by any designing knave as to follow him blindly, and serve his selfish purposes

against their own best interests—then, such a people can, on no account, be trusted with the means of attack. To take an obvious example: The English, and still more the Scotch, might safely be trusted with learning the use of arms; the Irish, certainly not. They have no habits of reflection or of thinking for themselves, and are ready at any moment to run in thousands after any wild vagary that any person or any faction, for their own sordid purposes, may raise an outcry about—ready to exert themselves for it without a moment's reflection, and without, in the least, taking the trouble to comprehend its meaning, far less to estimate its consequences. To govern such a people, mercy towards themselves enjoins the duty of its rulers being strongly armed, and having a powerful body of police at their disposal.*

In the general case, however, where the people are in ordinary circumstances, and of the usual character and habits, there is no better mode of providing for the national defence than the general arming of the people. It must be observed, that while the rabble are taught the use of arms and a certain degree of discipline, the more respectable classes are, in like manner, instructed and prepared; and in all countries placed in ordinary circumstances, these will be sufficiently powerful to keep down the tumults of the lower orders. The preservation of the peace always must be the first interest of all who have property. Besides, they have in proportion to that property numbers of persons dependent upon them. An illustration of this may be derived from considering the number of fundholders in England. They are known to exceed 600,000; and, consequently, could of themselves bring forward a force of 150,000 men, who, in the case supposed, would all be roused in defence of the existing order of things, and to resist any violent change fatal to public credit.

* This was written fifteen years ago as part of the Political Philosophy of the Useful Knowledge Society; but it is now first published.

But this is nothing compared to the force which the landed interest could raise to protect the existing order of things. On an income of sixty millions we may assume 200,000 proprietors, for that is supposing £300 a-year the average, certainly greatly above the truth. The tenantry and persons in their employ must amount to twice as many. Here, then, would be an army of 600,000 men—most of them excellent soldiers from their hardy habits, and those who were less hardy more than compensating for their defect by a gallant spirit, which nothing could resist. We are now supposing all the mercantile and manufacturing classes to remain neutral. The masters, however, would set themselves against all violence involving destruction of property, and would, if not overpowered, certainly divide the men, should these be disposed to join the lawless multitude; so that no danger can be apprehended from the measure of defence suggested, because it would bring with it the most effectual security against any mischief that it could give rise to.

The training of the people, and drawing them forth to actual service, either in rotation or by lot, has been often, indeed generally, resorted to by absolute governments without any fear of making the whole of their subjects capable of resistance, because they have always adopted this plan of defence in conjunction with the maintenance of large regular armies. A prince having twenty millions of subjects has no fear of creating an army of rebels four or five millions strong, while he has two or three hundred thousands always embodied, and in his pay, disciplined and obedient to his will. Indeed, the impossibility of any extensive concert among the people, and the certainty of the utmost concert as well as unity of design, by which any revolutionary attempt would be met at any moment, is the great, nay, the only security of absolute power, whether its subjects be armed or not.

It is not difficult now to deduce the general

principles which ought to govern the military policy of a country, that by which the government performs its second great function, providing for the national defence.

1. In ordinary circumstances, the regular force maintained should be the smallest which the state of the country's foreign relations and the condition of other countries will permit. A due regard must always be had to their condition; because if a country is surrounded by neighbouring states having large standing armies, a sudden combination of these, especially if it have no alliances on which to depend, may overwhelm it by an invasion of numerous well-disciplined troops, against which its volunteers, or even its militia, called out for the occasion, and still less its levy *en masse*, could not make head. Nevertheless, if the country be of large extent, the people well disposed, and the use of arms generally taught, no invasion can easily overpower it; for we have the experience of many such attacks failing when the aggressors had gained one or two pitched battles, and then were forced to retreat before a general rising of the people. We may therefore lay it down as clear, that both for the sake of economy, for the safety of liberty, and for avoiding war, the lowest regular army that it can be safe to keep up—regard being had to the stability of the existing peace and the military preparations of neighbouring states—is all that the people can justifiably be called upon to raise and to pay.

2. Beside furnishing the garrisons at home, and providing for the security of its foreign possessions, if it have any, a sufficient staff of both commissioned and petty officers should be maintained beyond those belonging to completed corps, for the purpose of disciplining and officering new levies, should a war breaking out render these necessary.

3. The bulk of the home defence should be

entrusted to the people at large, trained regularly to the use of arms, and called out in rotation, so many every year for a few days. Only in very extraordinary circumstances can it ever be dangerous to entrust people with a knowledge of the use of arms. That they should universally have arms, is wholly unnecessary.

4. The regular army should be formed—both that portion of it which is always kept on foot at home and abroad, and that portion which is added by levies on a war breaking out—entirely by voluntary enlistment. There is every reason, both of justice and of policy, for preferring this to any other mode of recruiting.

In the *first* place, you thus take from the community only its overplus of hands,—those which have no profitable employment by other labour. Of these there are many even in peace, from the fluctuations in trade. The war throws more out of employment. The recruiting becomes, therefore, a relief to the pressure thus felt, and relieves the market of labour at the time when it most requires relief.

Secondly, The class of idlers who are of tendencies little beneficial to the ordinary industry of the country, or even to its peace, make often very good soldiers. Their bad habits are improved by discipline; their spirit of adventure is not unsuitable to the military life.

Thirdly, Nothing can be more unjust than to compel the enlistment of men to whom the service is hateful, and whose occupations are sufficient to support them, while you have a class who rather prefer it, and to whom it is beneficial.

Fourthly, Any means of compulsion falls most unequally on the different classes of society. To one it is personal service, with banishment from home, and the cessation of all ordinary and favourite pursuits. To another it is only the payment of a tax, easily afforded, — the hiring a substitute. The ballot, or letting this fall by chance, makes the matter worse

rather than mends it. The conscription has all the vices of a poll-tax, which render that impost hateful, and to anything like a free country, intolerable, and it has this in addition: If each man, when called on in his turn, or by lot, could afford to pay for a substitute, it would be exactly a poll-tax, and the poor man would pay the same amount with the rich. But this never can be the case as long as there is an unequal distribution of wealth; therefore conscription is to one man personal service, to another the payment of a tax. Introducing the lot only makes this grievous and unequal burthen fall at hap-hazard, and without any discrimination.

These reasons sufficiently prove that enlistment by voluntary means is the only just and politic method of raising troops, whether for the standing army, or for the levy required by war.

Fifthly, No account has been taken of maintaining forces with a view to secure the government against revolt, or to do any other police duty. This is not the legitimate use of a regular army. The police service should be entrusted to men hired for the purpose, as a part of the civil and quasi-judicial establishment of the country. These men will always side with the government in quelling riots, and in preventing, as well as putting down even revolts. Beside the regular troops required for garrison service, and the skeleton regiments or bodies of officers—commissioned and non-commissioned — always kept up, afford another security to the State. A third is the interest, the general and prevailing interest, of all classes of proprietors, and all their dependents, to preserve the peace, and to prevent rebellion. If the people are trained we have seen how this general interest is sure to operate. When joined to the effects of the employment given for police purposes, nothing tends more to prevent any revolt from breaking out, and to suppress it when it does.

We have already shown that a country may be placed in extraordinary circumstances, to which this principle imperfectly applies. But let rulers in every such case take the earliest opportunity of probing the grievous malady of which it is a symptom; they may be well assured that the body of the State is labouring under a great disease, of which it is their bounden duty to trace the causes, as well as to ascertain the nature. They will almost always find that some misgovernment, either the withholding of right, or the inflicting of wrong, lies at the root of the discontent. To redress these grievances is necessary, as well as just policy; until they be redressed the State labours under all the evils of an unnatural condition; and of these it is not the least, that every vile, ignorant, designing empiric will interfere with his nostrums for the base love of gain, unless the regular practitioner performs his salutary duty.

Hitherto we have treated of the land branch of the military service. The naval defence of a State must depend chiefly upon the extent of its sea-coast, the number of the places exposed to attack from the sea, and the depth of the territory inland. In proportion as the sea frontier of the country is long, compared with the land frontier, and in proportion as it offers points of attack, the necessity of great means of naval defence is increased. This is as to the defence of the territory. But its commerce requires defence independent of its territory; and a State may have but a single port or two, and yet have much mercantile shipping, and may thus require the protection of an armed navy. Also, it may have a powerful navy to aid its land operations against an enemy. But, generally speaking, the amount of its marine commerce will depend upon the number of its ports; and this will regulate both the demand for a navy and the power of forming one. Foreign possessions are here taken into the account as home. Their defence

requires a navy both on account of the mercantile intercourse with them requiring protection, and on account of their being exposed to attack. The means of building ships may be within the reach of any State that has but a furlong of coast with a single good harbour. The means of manning them with crews skilful enough to navigate them, depends altogether upon the extent and nature of its mercantile pursuits, the number of its merchant ships, and the voyages upon which they are usually employed.

1. The more remote commerce and longer voyages are upon the whole more fruitful in their supply of mariners than the shorter ones. When vessels have to remain six or seven weeks at sea, remote from all help, they must have more hands on board to provide against accidents. Compare the numbers of men in a West Indiaman and in a Baltic or Hamburgh trader, and you will find one man to thirteen or fourteen tons in the former, and one to twenty-two tons in the latter. The whale fishing furnishes between four and five times as many seamen, in proportion to the bulk of the vessels, as the Baltic trade. The larger size of the vessels employed in long voyages is further material when they are regarded as a means of training seamen for the navy of the State. They teach the men the management of the kind of vessels of which that navy consists. They are also capable of being employed as transports, and even armed as ships of war. Most of the steam-vessels now used in our trade could be converted easily into men-of-war of various sizes. The size of the vessels is a material consideration in another important respect. If a sudden emergency requires an immediate supply of seamen, the smaller ones, navigated by three or four hands, cannot give up any part of that complement, either to a compulsory levy or by voluntary enlistment, without the stoppage of their trade. From the larger vessels some may easily and safely be obtained.

2. The coasting trade and the distant trade have each their advantages in training mariners. The former is more exposed to danger, requiring the most constant vigilance, which the neighbourhood of a coast always calls for, and gives more skill in the management of anchors, than the more regular and less anxious navigation of the Atlantic or the Indian Ocean—more even than the shorter voyages of the Baltic and the North Sea. But the longer voyage has the advantage of keeping the seaman longer on board; the crew of a West Indiaman or an East Indiaman are more months in the year on shipboard than the crew of a Newcastle collier or even a Hamburgh trader. There is also more regularity and discipline in a ship which has twenty or thirty men than in one manned by three or four.

3. The amount of capital employed in any branch of commerce governs the number of seamen which that commerce trains, according to the nature of the commerce; and, generally speaking, the longer voyages are employed to bring home more bulky commodities, and therefore the capital invested in them affords a larger supply of mariners than that vested in nearer branches of trade. Thus the goods brought from the United States, and from the British Colonies in North America, are much less costly than those sent thither. The latter are from £32 to £54 per ton; the former only £16. The goods from the West Indies run from £27 to £31 per ton; those to the Straits, £43; to France and Germany, £76; to Holland, £178; to Flanders, £180. These sums are taken from the year 1800—a year of war; in peace, a smaller proportion of the finer manufactures is exported. In very long voyages, like those to the East Indies, the value is always, of course, much higher—the imports from thence for the same year were £98 per ton; the exports thither, £55. The whale fishing exceeds all the other branches of trade in the small amount of capital

and the great proportion of seamen employed. The value of the cargoes from Greenland and Davis' Straits was only £6 17s. per ton; from the South Seas, £12 12s.

4. In all the particulars which we have been considering, the advantages of colonial commerce are manifest. It is the kind of distant trade which supplies seamen the most easily in these particulars. But it has two other advantages over every other branch of traffic, and both are very material. The one is general as to the wealth of the community; the other applies particularly to its means of naval defence.

In the *first* place, it replaces two capitals, both belonging to the country. The foreign trade of every State replaces two capitals, one of which belongs to the foreign country with which the commerce is carried on. But the colonial trade replaces two capitals, both belonging to the subjects of the same State. Thus the trade of England with France replaces with a profit the English and the French capitals that drive it. The trade of England with Jamaica, or of France with Guadaloupe, replaces the former two English, the latter two French capitals. The former is as much a home trade—an English trade—as the commerce of the towns of England with the country, or of one town with another—of London with Birmingham or with Ipswich; the latter is as much a French trade as the commerce of Paris with Bordeaux or with Rouen. Now, of all commerce which any country can carry on, the most profitable—and for the above reason—is the home trade.

In the *second* place, the seamen employed in the colonial trade are never, except by mere accident of weather, in a foreign port. They are thus exposed to much less risk of desertion; their numbers are more easily completed if defective; and, above all, they are always ready and forthcoming for the service of the State should a war break out. In such an event the

government of this country must wait for the return of Baltic traders from the Gulf of Finland, or of Turkey traders from the Levant; but in Halifax or in Kingston the North American or West Indian traders can afford the requisite supply of hands, and very possibly in the part of the empire where their services may most be wanted.

It is further to be considered that the colonies afford harbours and ports, which may shelter the navy in the operations of war carried on against the foreign settlements of the enemy. They may afford points of attack against these settlements, and against the mercantile navy of the enemy. If the navy of this country had not possessed so many good harbours and strong places in the West Indies, and in North America, it is manifest that we should not have been enabled to seize all the French and Dutch colonies, or to sweep the merchant ships of France and Holland from the sea, so easily and so regularly as we have always done during the first year or two of every war which may unhappily have broken out to disturb the prosperity of European nations.

These reasons, and the great advantage of having a resort for the profitable employment of capital, as well as labour, are the grounds upon which so great store has ever been set upon colonial possessions by the nations of modern Europe. The ancient states planted colonies, but they were mere emigrations, either to take off superfluous numbers of the people, like those of the Greek republics, or they were, like those of Rome, advanced posts for securing their conquests. The moderns alone have used their colonies as extensions of the parent State's territory, and as ministering to the wealth and greatness of the community, by both augmenting its agriculture and its commerce. The desire of finding precious metals was the origin of these establishments; but they have in all cases yielded a far richer return of wealth than any which mines

could render; and in most cases their mineral produce has formed no part of their supplies. If it be said that one State possessing colonies, others might trade with them, and thus be under no necessity to plant or to conquer remote settlements for themselves, the answer is, that all States have, and naturally have, subjected their colonies to strict monopolies, and suffered no foreigners to interfere with their commerce. So that to have any share in the colonial trade it becomes necessary to have colonies. We shall afterwards examine the subject more fully in its order. It is here only introduced in its connection with the naval branch of national defence.

For the purpose of deriving from these colonial possessions all the benefit that they could render to the naval force of the State, the monopoly just now alluded to has been established, as well as for the sake of profiting more largely by the colonial traffic. In this proceeding the interests of the colony have greatly, of the mother country considerably, been sacrificed; or rather one interest has been postponed to another. The wealth of the colony would in every case be far more rapidly increased were its planters and merchants allowed to trade freely with all countries, as well as with the parent State, to seek for their produce the market that afforded the best prices, and to purchase for their supply wherever they could find the cheapest goods. On the other hand, the consumers of colonial produce at home would benefit by being able to purchase it wherever it was to be had cheapest, instead of paying prices kept up by the reciprocal monopoly of the home market, given to the colonists in return for the mother country's engrossing the supply of the colonies. But the necessity of providing a sufficient supply of seamen for the navy is a paramount consideration, and Dr. Smith himself admits that this is of so much more importance than any consideration of wealth, as to justify the system of our navigation laws.

These laws not only create the mutual monopoly already referred to, but prevent foreign shipping from interfering with our trade. All vessels are required to be navigated by a British master, and three-fourths of the crew British seamen. No foreigners can be employed in the coasting trade, and no foreign vessel is allowed to carry on either the coasting trade, or the commerce between this country and any other except that to which it belongs. This was designed, in the seventeenth century, to take from the Dutch a portion of that carrying trade of which they then had, by their better seamanship and cheap navigation, engrossed almost the whole—being the carriers for nearly every part of the world. This important act, commonly called the Navigation Act, was originally passed in Cromwell's time, and was renewed at the Restoration. No doubt whatever can be entertained that it has greatly tended to the increase of our naval force.

The mode of raising men for the navy, and generally, the principles which ought to govern the raising and employing a naval force, do not materially differ from those already explained as to the army. The necessity of trusting to professional men, and having a separate body for the service, is still more apparent here than in the case of land forces. The preference of voluntary enlistment is also plain; and the injustice of compelling men to serve in the navy is still more clear than the injustice of a military conscription, because the naval service falls on one particular, and not very numerous portion of the community—a portion already sufficiently exposed to perils and to hardships. The only intelligible arguments in favour of impressment are confined to one point,—the necessity of suddenly obtaining a supply of seamen when a war unexpectedly breaks out. The fact, however, is, that no war ever can break out so suddenly as to have given no notice and no power of providing men by bounty. There can be no doubt that sufficient encouragement offered

to enter the navy would always attract as many good hands from the merchant service as the necessities of the State could require. A judicious plan of enrolment, with a ballot, might be resorted to. But no one can seriously doubt that the sailors are a class fond of adventure, fond of money, and careless of danger, to which, more than any other workmen, their lives are always exposed. The offer of large wages, and the advantages of a contingent pension if disabled, or by right after a certain time of service, would obtain their aid, however sudden the emergency that called for it. To maintain the barbarous, though lawful and very ancient practice of impressment, merely in order to save high bounties, is, of all injustices, the most oppressive.

It has often been doubted whether the great change introduced by steam into navigation will not have a tendency to equalize the forces of the maritime powers, reducing nearer to a level both their strength and their skill. There seems as little ground for entertaining any such expectation as can well be imagined. There must still be required skill, though it may be of a somewhat different description; that skill must be connected with vessels sailing; it will be nautical skill, as it is now. Beside the naval superiority of different nations at present bears nearly a proportion to their manufacturing, that is, their mechanical skill. Now, such skill is eminently required in conducting steam navigation. The numbers of vessels and the supply of seamen, of course, cannot be affected by the change. These will bear their former relations in different States. How far the operations of war may be affected by the change is, perhaps, not altogether the same question. But if attack will depend less upon the winds, it will depend more upon numbers and skill; and defence against invasion will be managed best by those who have both most skill and most naval means. One operation may possibly be facilitated; a sudden

invasion by landing a force at one point of a coast, and alarming the country assailed, may now become more possible. But it can end in nothing more than an alarm, because the invader must either run the risk of his whole force being cut off, or he must keep his steam fleet on the coast exposed to the enemy.*

The navy of England scarcely had an existence in early times. It became known in the reign of Elizabeth by the victory over the Spanish Armada. The English fleet in that fight consisted of 176 sail, manned by 15,000 men; but only 40 ships and 6,000 men belonged to the public service; the rest were furnished by the mercantile towns. The navy did not increase during the next two reigns; and Cromwell found it so robbed by Prince Rupert, who carried off 26 sail, that he had but 14 two-deckers, and of small weight of metal. He soon restored it, and gave Blake a fleet which beat the Dutch,—then the first naval power in Europe. Cromwell's navy consisted of 20,000 seamen and 150 sail, of which 50 were two-deckers. James II.,

* In 1845 there was a committee of the Lords upon the patent law, and I being the chairman, the Duke of Wellington, who understood Lord Dundonald was to be examined before us, begged that I would take the opportunity of obtaining his opinion upon the effect of steam navigation, especially in war. I took the first occasion of there being few persons in the room, as the Duke was anxious to have the evidence kept private; and I examined Lord Dundonald very minutely on the whole subject. He gave the results of his long experience in naval war; and his intimate acquaintance with mechanism and steam, respecting which he had taken a patent, enabled him to deal with the subject in all respects. Beside giving the opinion which he had formed on the matters suggested by the Duke, he answered a great many questions on the capacities of foreign seamen of different nations, with whom he had had intercourse, especially those of France, Italy, the Levant, and the Baltic. The short-hand writer was detained for some hours to copy his notes, which were destroyed, and the copy sealed up and sent to the Duke at his office. I should hope that this document has been preserved, as he deemed it of great importance.

The general result, as far as relates to the question raised in the text, was, that England gained by the change very considerably—always allowing for the chance mentioned at the top of the page. Lord Dundonald gave his opinion very confidently, and as the result of long and mature consideration. He discussed all the points and assigned his reasons.

a sailor himself, raised it to 173 sail, having nearly 7,000 guns and 42,000 seamen. In William's time the famous battle of La Hogue gave it the superiority over the French navy which it has ever since maintained. At the accession of George III., in 1760, it consisted of 325 sail, of 321,000 tons, and 52,000 men, with 18,300 marines. In 1792, before the war, it consisted of 556 sail, of which 124 were in commission. In 1815, at the end of the war, there were 778 sail, of which 218 in commission. Now, it may consist of 443 sail, of which 172 in commission. There were, in 1792, 16,000 seamen and marines; in 1815, 160,000; and now about 26,000. The sums voted for the expense of the navy were, in 1792, nearly two millions; in 1815, seventeen; and in 1835, four and a-quarter.

APPENDIX.

No. I.

FEDERAL UNION.

We may remark that there are two ways in which the federal relation subsists among States. The one, which may be termed the *Proper* Federal Union, is where two or more States, having their separate governments for all domestic purposes, are united by a central government, which regulates their mutual relations as members of a political community, but does not interfere with the functions of the several governments, and their authority over the individuals who are their subjects, unless in so far as those functions and that authority may affect the federal relation; and it is of the essence of this proper federal union that its different members should have equal rights, and that all should bear a part in the central administration. The other, which may be termed the *Improper* or *Imperfect* Federal Union, is where two or more states, having their separate governments for certain domestic purposes, are united under a central government, which controls each state, and forms a part of its government for domestic purposes; in a word, where several states having separate political institutions are under one executive administration. Of the former kind were the federal unions of Ancient Greece, and in modern times those of Germany, Switzerland, and the United States of America. Of the latter kind was the union of England, Scotland, and Ireland during the seventeenth century; of England and Ireland previous to that period; and of Great Britain and Ireland during the eighteenth century.

To the same class of Imperfect federal unions belonged the monarchies of Austria and Prussia ever since they consisted of more than one state; the Scandinavian monarchy of Sweden, Denmark, and Norway, from the union of Calmar

in 1397 to its interruption in 1448, and occasionally at intervals from thence till its final dissolution in 1521; the Swedish monarchy since the cession of Norway in 1815, and previously after the acquisition of Pomerania in 1648; the Danish ever since the accession of Schleswig and Holstein; the Spanish, consisting of the kingdoms of Spain from the latter part of the fifteenth century—of Sicily, Sardinia, Naples,—and of Austria, the Milanese, and the Netherlands added to these vast dominions at the beginning of the sixteenth century, and Portugal joined to them for above fifty years. The French monarchy, indeed, during the earlier parts of its history, and before the different duchies and principalities were incorporated in one kingdom, is another example of the imperfect federal union, as is the English monarchy while it possessed dominions in France. The union of Hanover with the British dominions from 1715 to 1837 comes within the same description; and the subjection of the conquered colonies to the Crown of the mother country constitutes a federacy of the like kind.

In all these instances the subjects of the central government are the inhabitants of the different states under its dominion; in the proper federal union, the subjects of the central government are, not the inhabitants of the different states, but the different states themselves, the inhabitants of each being the subjects of its separate government. Thus the Venetian and the Hungarian are alike subjects of the Emperor of Austria; the former is subject to him as King of Lombardy and Venice, the latter as King of Hungary. The Bohemian too is subject to him as King of Bohemia; but before 1806 the Emperor, with the Diet, held dominion over Bohemia as a member and subject of the Germanic empire, while the Bohemian was the Emperor's subject as King of Bohemia. So before 1801 a Hanoverian was the King of England's subject as Elector of Hanover, and an Irishman was his subject as King of Ireland; nor did the existence of States in Hanover and of a Parliament in Ireland prevent the Sovereign from exercising his authority as ruler, greater or less according to the constitution of the two countries, in Hanover and in Ireland; but Hanover was itself subject to the authority of the Germanic Government, which exercised its dominion

not over the Hanoverians, whose ruler was the Elector, but rather over the Elector himself. In like manner a Canadian and an Englishman are both subjects of the British Crown, though there is a Parliament in the province and one in the mother country. But if Canada were separated from the mother country, and united with the States of North America, the Canadian would be subject to the Provincial Government; and the State of Canada would be subject to the Federal Government, to which the Canadian would only be subject in respect of matters affecting the relation of the States to each other in the Federal Union. Suppose it were expedient to change the municipal law of Bohemia while under the German empire, and of Canada in the case put of its union with the North American States; this change would only be effected by the Government of Bohemia and of Canada, and neither the Diet of the Empire nor the Congress of the United States could interfere otherwise than as they might recommend such an alteration to the local governments, if the interests of the Germanic and the American federal body rendered this advisable. But it is far otherwise in the Imperfect Federal Union. The Emperor of Germany, as King of Bohemia, would take the steps necessary for effecting the alteration required in the Bohemian law, and the Executive Government of Great Britain would act in like manner with respect to the Canadian law, as if the former governed the kingdom from its capital of Prague, and the latter governed the province from Quebec, instead of being represented by viceroys and deputies.

The tendency and consequences of the two kinds of union are dissimilar; beneficial in the one, hurtful in the other. The possession of many dominions with separate constitutions by one sovereign power, whether monarchical or republican, may confidently be pronounced always to have a pernicious effect, and to be inconsistent with the rights and liberties of all. In the *first* place, the natives who inhabit the different countries are always more or less strangers to each other; and even if their origin had been the same, and they spoke one language, the diversity of their institutions would draw a line of separation between them. In these circumstances there is no probability of

the Government ruling with impartiality. One country will always be favoured more than the others; and this predilection is fully as likely to exist in a republican council and senate as in the court of an absolute prince, because national prejudices have quite as much scope where the popular feeling is represented as where one or two individuals think and act for themselves—not to mention the want of individual responsibility, and the effect of multitudes, and their representatives, keeping one another in countenance when the pursuit of a common interest or the gratification of a general propensity is the object in view.

But, *secondly* and chiefly, the evil consequences of the Imperfect federal union are to be found in its tendency to render all securities unavailing which the institutions of each state may have provided for the good government of its people. For the people have in each state to struggle against not merely the force and the influence which its resources place at the disposal of the ruling power, but likewise against whatever force and influence the same power can derive from all its other dominions; and whatever surplus is to be found over what is wanted for counteracting any one or more of the other states may be brought to bear upon any given point and render the government all-powerful there. In order to perceive the effects of such a union more clearly, we shall suppose the case of a limited monarchy, with a Parliament like that of England or France, united under the same Crown with another kingdom the resources of which are at the Crown's disposal. It is evident that the prince could, without the least infraction of the constitution, govern the country as he pleased, and never consult the wishes of his Parliament, provided he had money enough from his other dominions to make the stopping of supplies immaterial. He could not change the laws, or carry any other measure to which the consent of the Parliament was necessary; but he might follow whatever course of policy he pleased, without the least regard to the interests or the wishes of his subjects and might civilly but firmly refuse to regard in any manner of way their united remonstrances. Such would have been the position of England if Hanover, instead of an insignificant, had been a great and wealthy country. Such is, in

fact, the position of every colony possessing a legislature. Thus, if the assembly of Jamaica or of Canada desires to have a change of measures and of ministers—if they have any grievance to complain of, and desire redress—according to the letter and theory of the constitution, they have the same means of obtaining it, the same remedy as the Parliament of the mother country has in similar circumstances; they may stop the supplies until their desire is granted. But as the Crown, while the Parliament of the mother country supports it, has the means of carrying on the government of the colony without any colonial supplies, the practical result is that the colony must submit; whereas, had the same thing happened at home, the Crown must have submitted.

This too would be the position of Ireland and of Scotland had they still local Parliaments; they would only possess a parliamentary constitution in theory and in name. As long as the English Parliament supplied the Crown with the means of governing the two sister kingdoms, the checks provided by the Constitution would fail in securing the rights of both; and the most grievous oppression might be practised upon the commercial as well as the other concerns of the people, to the gain of the English revenues, and to the ruin of the Scotch and Irish, without the least infraction of the Constitution. The different countries under one sovereign in Prussia, and still more in Austria, have suffered severely at various times from misgovernment of exactly this description. If, for example, Hungary were a separate state unconnected with Austria, and the king had no resources but what he derived from his Hungarian Parliament, many of the most oppressive restrictions upon industry, as well as other grievances, would long since have ceased. The extinction of the free constitutions which the European monarchies all originally derived from the Feudal system has been mainly owing to the same circumstance.

The necessity of providing for defence against a powerful neighbour is the only justification of the Imperfect Union. The Proper Federal Union, however superior in other respects to the Imperfect, is in this particular manifestly less efficacious; for it has less unity and vigour in council,

and less promptitude in action. But a complete incorporation of the several states united under one sovereign rule is incomparably better, both with a view to defence and with a view to good government, than the continuance of separate constitutions, which only serves to keep up national dissensions by perpetuating lines of distinction, and takes away the best chance of amicable connection as well as of wholesome administration, that the different portions of the people can have.

It may then be laid down as a general position, that, if the necessities of providing for defence permit it, different states should continue separate, and each subject to its several government; that, if a union of two or more becomes necessary for mutual protection, an incorporating union is in every view the best; if irreconcilable diversities of language, manners, and institutions render this impracticable, a Proper Federal Union is the next best expedient; while a union of the other sort is the worst connection which can subsist among different states.

No. II.

GOVERNMENT OF THE UNITED STATES.

THE form of government framed and successfully established by the American people, under the guidance of some of the wisest and most virtuous statesmen ever called to administer national affairs, although republican and federal, was yet constructed on the principles of the British Constitution as nearly as the different circumstances of the Colonies would permit. The principal variations were the substitution of an elective chief magistrate, personally responsible, for one hereditary, and only responsible through his ministers and agents; the Upper House being elective like the Lower; and the nation consisting of a confederation of republican States, each independent in many essential particulars, but all combined as regards foreign relations under one head, and all governed by a Central Legislature, of powers limited by law as to its

jurisdiction over each individual member of the Union, though quite absolute as to the general concerns of the whole confederacy and the federal relations of its component parts.

The affairs of the Colonies having during the revolutionary war been conducted by a congress of delegates from each, on the restoration of peace and the final establishment of their independence, they framed thus a federal constitution, which was only gradually adopted by the different members of the Great League. Nine States having ratified it, the new form of government went into operation on the 4th of March, 1789. Before the end of 1790, it had received the assent of the remaining States. This assent was very variously given. In New Jersey, Delaware, and Georgia, the local legislatures adopted it unanimously; in Pennsylvania, Connecticut, Maryland, and South Carolina, large majorities approved; but in the other six States it was carried by small majorities, and in three of these, Massachusetts, New York, and Virginia, the voices were nearly balanced for and against it. Nevertheless, this slow adoption and these great divisions of opinion are the best proofs of the ample deliberation which was bestowed upon so important a proceeding; and subsequent reflection did not fail to bring over the dissentient parties, so that it soon obtained a very general if not a universal assent.

The fundamental principle of the Constitution is, the vesting of the supreme authority, executive and legislative, in the people, to be exercised in every case by their chosen representatives, in no case except in their elections by themselves. And this at once distinguishes the great modern republic from all the Democracies of ancient times. The representative principle is fully and universally introduced into it, and the people depart completely with all their power to their chosen deputies. It is another and an essential principle, if indeed it be not involved in the former, that the choice of representatives and a chief magistrate is the only elective function exercised by the people, all civil and military officers, and especially all judicial functionaries being appointed by the executive government.

The supreme legislative power is pronounced by the

first article of this Constitution to reside in Congress, that is in the two Houses, not as here, in the two together with the chief magistrate. We are therefore first of all to consider the constitution of that governing body, which consists of the House of Representatives and the Senate.

The House of Representatives is chosen every two years by each of the States in the Union electing Deputies, in the proportion of one for every 30,000 inhabitants.* Their numbers are thus in most of the States always increasing, though in some, as Rhode Island and Delaware, they have remained stationary. In others the increase has been great. Thus Massachusetts sent originally eight, and sends now seventeen† members; Pennsylvania from eight has risen to twenty-four; New York from six to thirty-four; and Ohio having at its admission into the Union in 1802 sent one member, sends now twenty-one, indicating that its population has increased at least in that proportion. The enumeration by which these numbers are regulated takes place every ten years. The whole number of members in 1790 was sixty-five, the population being then a little under four millions; in 1830 it had increased to nearly thirteen, and in 1840 it exceeded seventeen millions. The numbers now are 223. The numbers are not only taken, but the proportions of members to population are determined every ten years; at present it is one for every 70,680.

The qualification required of representatives is three-fold. They must be twenty-five years of age complete; must have been citizens of the United States for one year; and must reside within the State which elects them. The right of election varies in different States, being enjoyed in each State by those who have the right of voting for the members of the most numerous branch of the State Legislature. Thus in Massachusetts there is a low property qualification; in some States all persons paying taxes vote; in others all paying a certain fixed amount. In the greater number of States the suffrage is nearly universal; that is,

* This was the proportion originally. It is varied, as we shall presently see, periodically.

† That is, the States of Massachusetts and Maine, into which the original State of Massachusetts was in 1820 divided, now send seventeen.

vested in all citizens of twenty-one years of age, and not paupers or convicts. Residence is in most States required, and in some the payment of a poll-tax.

The Senate is elected for six years; each State returns two senators; and the choice is made by the State Legislature either voting together or separately, according to the Constitution of each State. One-third of the senators retire every two years, and their place is supplied by a similar election. The qualification for the Senate is threefold—being thirty years of age, having been nine years citizens of the Union, and residing in the State by which they are named. The members of the Senate are at present fifty-two.

The Congress is composed of the two Houses, and it must meet once a-year at the least. Its power to tax is unlimited, except that no duty or tax can be laid on one State or one condition of men exclusively, nor any financial advantage in any way given to any part of the Union; a restriction which it is obviously somewhat difficult to preserve strictly in practice, and which necessarily gives rise to many disputes. In the Congress also resides the important power of making war; but it can only vote supplies for maintaining an army during two years by any one act. This seems at first a departure from the model—the British Constitution; but it is rather in appearance than in substance a departure. The King in England can proclaim war, but without the sanction of Parliament his proclamation must immediately be retracted. The vote for the army, too, is for one year with us, and it is yearly renewed. In the United States, if the war continued, the vote would be renewed for two years or for one, as circumstances might require. The real and main difference is, that they have no standing army, or so small a one as only to serve for police, or to guard the weak points of their frontier. It is less than 7,000 men; the militia amounting to 1,711,000.

In the House of Representatives resides exclusively the power of propounding taxes of any description, but not so exclusively as in England, because the Senate may alter and amend the supply bills. They alone can impeach any one, and the Senate tries the charge, a majority of two-

thirds being required to condemn. A majority of each House forms its quorum, and is required for ordinary business. Each House has great powers over its members: it can expel by a majority of two-thirds; but a bare majority in all cases may pronounce censure, or decide on questions of qualification. The members of both Houses are paid for their attendance; all enjoy freedom from personal arrest for debt, and no one is answerable for his conduct in Congress. By an extremely injudicious provision no minister can sit in either House, nor any person holding any public employment. Hence the most effectual responsibility under which the servants of the State and its executive government can be placed is destroyed; and neither an explanation of public measures, nor a chance of preventing errors by discussion, nor any opportunity of defending the Government's proceedings, is afforded. The suffering amendments upon money bills is no doubt an improvement upon the English Constitution, but there is still left a remnant of the same error on which our Commons claim the exclusive right of dealing with taxation. Money Bills can only originate in the House of Representatives, as with us they cannot in the Lords, on the ill-considered ground that the Lower House represents all who pay taxes, whereas the members of the Upper House, in both, pay an ample share, and our Peers moreover have no voice in choosing those of the Lower.

The choice of the President and Vice-President is somewhat complicated, being obviously so contrived from the feelings of jealousy which prompted the Venetian statesmen to adopt a still more complex mode of election. Each state appoints, in whatever manner its own legislature may direct, a number of electors equal to the whole number of those whom it sends to both the Senate and the House of Representatives, no person holding any office in or under the Government being eligible as an elector. The electors then meet and vote by ballot for two persons, one as President, and one as Vice-President; one of whom at least must not be an inhabitant of the State. A list of all the persons voted for, with the number of votes for each, is then transmitted to the President of the Senate; and by him, in the presence of both Houses, all the lists

thus transmitted are opened. The votes are counted; and the person having the greatest number of votes as President is declared President, provided he has a majority of the whole number of electors appointed by all the States. If no person has such a majority, then the House of Representatives, voting not *per capita*, but by States, each State having one vote, chooses one of the three highest candidates as President. The same course is pursued in ascertaining the choice of the Vice-President, but if no candidate for that office receives a majority of the electoral votes, the Senate designates one of the two highest candidates as Vice-President.

The qualification of President and Vice-President is being thirty-five years of age, and having been fourteen years resident in the United States; and no person not a natural born citizen or a citizen at the time of the adoption of the Constitution in 1789 is eligible to either office.

The President is commander-in-chief of all the public forces, naval and military; but in the exercise of this trust he may demand the assistance and advice of any officer or any constituted body in the State. He participates with Congress in a declaration of war as in any other act of legislation; but all negotiation is exclusively entrusted to him, subject to the consent of the Senate, two-thirds of whose voices are required to make any treaty valid. The same consent, but only of the majority, is required for his nomination to all offices, the appointment of which is not otherwise provided for, as ambassadors and judges. During the recess of Congress he fills up all vacancies, but such nominations only last till the end of the next session, unless confirmed by the Senate. He has also the power of removing from all offices held during pleasure. He has the right of refusing a Bill presented to him by the two Houses; but if he rejects it he must assign his reasons. These are considered by the Congress, and if two-thirds of both Houses again present the Bill, it has the force of law whether he consents or not. It has also the force of law when presented for the first time if he do not give his answer within ten days, to prevent his rejecting it by merely delaying to give his answer.

The Judges hold their office during good behaviour, as

well those of the inferior as of the superior courts, and they can only be removed by an impeachment, in which case the President has no power of pardoning. Their salary cannot be altered during their tenure of office, but they have no retiring pensions.

The courts constituted in the United States are the Supreme Court and such inferior courts as Congress may from time to time appoint. The jurisdiction of the Supreme Court extends to all cases arising not only between individuals of the same state, but to all questions between parties in different states, to all questions between different states themselves, to all matters connected with treaties, to admiralty and other maritime cases, and to questions affecting ambassadors and other public functionaries. In cases respecting ambassadors and other ministers, and in cases between different states, its jurisdiction is original; in all other questions it is appellate.

The criminal law and the civil law is, generally speaking, that of England, subject to such alterations as have at various times been made by the Congress or by particular States. There is no treason but that of levying war against the State or adhering to its enemies; and an attainder does not work corruption of blood, nor any forfeiture except during the party's life. The Habeas Corpus Act cannot be suspended, except, during an actual invasion or rebellion, the public safety should require such an act of Congress. There can be no trial except by a jury. All crimes must be tried in the State in which committed, but of crimes committed in no State, Congress may by law appoint the place of trial.

The Congress may admit any State into the Union, but it cannot erect a new State within any of those already existing, nor unite any two or more without consent of their several legislatures. Any alterations in the Constitution may be taken into consideration provided two-thirds of both Houses recommend them; and then the proceeding is this:—If two-thirds of all the States agree, by their several legislatures, to call a Convention, it shall be assembled, and such amendments as it may propound in the Constitution shall be adopted if either the legislature of three-fourths of the States, or Conventions in three-

fourths, shall agree to them, the Congress having power to appoint either the one or the other course. To this power of alteration there were in the original Constitution two exceptions, one of which has now expired: it prevented all alterations in respect of what was delicately termed the "migration or importation of such persons as any State now existing may think proper to admit"—in other words, the African Slave Trade. This was to remain untouched till 1808; and it is only fair towards the Americans to consider, *first*, that they had originally desired to have no slave trade, and that the Mother Country had most wickedly as well as most foolishly (if indeed there ever be any difference between these two things) refused to free them from this guilt; *secondly*, that they abolished the traffic the instant the Constitution allowed them. The other exception relates to the equality of the States. No change can in any way be adopted which shall deprive any State, without its consent, of an equal vote in the Senate.

We have now seen that this Constitution professes to lay down certain fundamental laws, which are binding not merely on the subject but upon the Congress itself, and upon all the State Legislatures. Hence arises this anomaly, that the supreme power is fettered: there is not, properly speaking, a supreme power; Congress is tied up: that is done by the American Constitution, which in ours is held impossible; the hands of the Legislature are bound; a law has been made which is binding on all future Parliaments.

When we at first contemplate this state of things, it appears to be sufficiently anomalous; and yet a little reflection will show us that it is, at least to a certain extent, the necessary consequence of the Proper or Perfect Federal Union. There is not, as with us, a government only and its subjects to be regarded; but a number of governments, of States having each a separate and substantive, and even independent existence, originally thirteen, now six-and-twenty, and each having a legislature of its own, with laws differing from those of the other States. It is plainly impossible to consider the Constitution which professes to govern this whole Union, this Federacy of States, as anything other than a Treaty, of which the conditions are to be executed for them all; and hence there

must be certain things laid down, certain rights conferred, certain provisions made, which cannot be altered without universal consent, or a consent so general as to be deemed equivalent for all practical purposes to the consent of the whole. It is not at all a refinement, as we have already remarked, that a Federal Union should be formed; this is the natural result of men's joint operations in a very rude state of society. But the regulation of such a Union upon pre-established principles—the formation of a system of government and legislation in which the different subjects shall be not individuals but States—the application of legislative principles to such a body of States—and the devising means for keeping its integrity as a Federacy, while the rights and powers of the individual States are maintained entire—is the very greatest refinement in social policy to which any state of circumstances has ever given rise, or to which any age has ever given birth.*

We are now to consider in what manner this is maintained in the Great Western Union; in other words, what provision is made for preventing either the States' Legislatures or the central body, the Congress itself, from overstepping the limits fixed by the Constitution.

In Greece there was an attempt to restrain by the Amphictyonic Council the several members of the Greek Confederacy, each within the bounds of what was deemed the Common Law duty (so to speak) of all. Nothing could be less perfect than the frame of this arrangement, as far as we are acquainted with its outline; nothing less successful than the operation of the contrivance; not to mention that it only professed to decide international points, those of war and alliance, and to redress grievances arising from the usurpation of one State upon another.

In America a very different and far more extensive provision is made for maintaining the Constitution and repressing all infractions of it, whether by the Central or the Local Legislatures. The States' Courts, and the Supreme Courts especially, have the right, and it is their bounden duty, to declare any given law which may have been made with all the appointed forms of legislature,

* The power of Congress in America extends not only over the different States, but over the inhabitants of each.

unconstitutional, as against the fundamental provisions of the Federal Union, or as against the laws of any given State, and to refuse it all operation and effect. Thus a law, a solemn Act by the supreme legislative power in one State, or by Congress itself—a Statute clothed with all the legal solemnities—a law, for example, to which the two Houses of Congress and the President of the Union have given their distinct assent—is declared illegal, is pronounced to be no law, is adjudged not to be binding, is treated as a mere nullity, because contrary to the Constitution; and this is done by Judges appointed to execute the Law, and to administer justice under it. Those Judges are required to regard the Acts of the Legislature as the Acts of agents appointed for a certain purpose, and clothed with certain powers; which purpose, if they have defeated, which powers, if they have exceeded, their Acts are held not to bind their principal, the People, or the Constitution. All their Acts are considered as only valid in so far as they are executed according to the powers given by the Constitution to the Legislature, which is as it were the mere instrument of that Constitution. It is as if the powers of our several Treaties and Acts of Union with Scotland and Ireland were considered binding on all future Parliaments, after being sanctioned by the Legislatures of 1706 and 1800, and could not be altered except by a Convention summoned for the purpose; and as if our Courts of Law were required to hold illegal all Laws made by the Imperial Parliament contrary to these fundamental provisions or articles, and to hold them mere nullities. It is not that until Congress formally repeals any given law, any Act inconsistent with it shall be deemed illegal, and treated as null and void, while a formal abrogation shall be valid and bind the Courts. This would resemble the Athenian Constitution, as we shall see in treating of the Γραφη Παρανομων. (Appendix No. IV.) But the American Constitution goes very much further; it denies to the Legislature the power to alter these fundamental laws, until a Convention of the people shall permit the change; and it treats as null and void any Act of innovation made by the Legislature before such Convention shall have given it warrant. This is the undisputed principle of the American Constitution, and is

constantly acted upon. Its great importance requires that we should give some examples of the Judicial power thus exercising its supremacy over the Legislative and Executive powers combined.

We begin with instances in which the States' laws, or laws of particular local legislatures, have been treated as unconstitutional and null.

The Constitution has reserved to Congress the sole power of regulating commerce, manifestly in order to prevent collision between the States. The legislature of New York granted, by an Act formally passed, an exclusive right of steam navigation within the waters of the State, to Livingston and Fulton. In the case of *Gibbons* v. *Ogden*, this Act was held unconstitutional by the Supreme Court of the United States in 1824,* although in 1812 it had been decided in the New York Court of Errors that five such Acts in favour of the parties were constitutional and valid, upon the ground of the internal navigation of each State being exclusively within its legislative jurisdiction; but as Chancellor Kent, in his *Commentaries*,† observes, no question whatever was raised, either in the States Court or the Supreme, of the Court's right to set aside any unconstitutional law.

In like manner a Bankrupt Law of New York, having a retrospective action, was declared void by the Supreme Court, as impairing the obligation of contracts; and in *Olmstead's case* a Pennsylvanian law protecting certain individuals from the process of the Federal Courts was declared void, not only as against statutory enactment, but as inconsistent with the common law of the Federal Union. Laws of Maryland and Ohio, imposing taxes on branches of the United States Bank, established in those States, were declared void, as interfering with the exclusive powers of the General Government to regulate trade. In the case of *Green* v. *Biddle*‡ it was held that, as a compact between two States came under the head of contracts (any law "to impair the obligation of which" is, by Art. 1, s. 10 of the Constitution, expressly prohibited), a law of Kentucky, called the "Occupying Claimant's Law," was unconstitu-

* 9 Wheaton, i. † I., 437. ‡ 8 Wheaton, i.

tional and void, and the titles to a vast extent of land thus became invalid.

The right of the Supreme Court of the United States to declare a law passed by the General Congress and approved by the President null and void, on the ground of inconsistency with the Constitution, is not less certain. The case, however, is much less likely to arise, because the most learned and experienced men in the Union having seats in Congress, and the whole States being proportionably represented, it is much less likely that any Act of legislation should take place contrary to the fundamental law. This power of adjudging a law unconstitutional is also possessed by the Circuit Courts of the United States, subject, of course, to appeal to the Supreme Court at Washington. In 1791 the Circuit Court of New York declared void, as unconstitutional, an Act of Congress. These Courts are Federal, being held under judges, not of the particular State, but of the Union.

A similar power is possessed by the State or Local Courts, in reference to the Acts of the state or local legislatures. In *Whittingham* v. *Polk*, in 1802,* it was exercised by the general Court of Maryland; and in *Bowman* v. *Middleton*,† as far back as 1792, the Supreme Court of South Carolina declared unconstitutional an Act of the local legislature, as being against common right and Magna Charta, because it took away a person's property without compensation. I mention this decision here, though referring to a State and not to a Congress Act, in order to show that a law may be declared unconstitutional which violates no express enactment or article of the written Constitution, but is only against the general or common law.

Not only may the Courts consider whether or not any Act of the Legislature is in its provisions unconstitutional; they may also examine the mode of passing it, and declare it null if the requisite forms of legislation have not been complied with. Thus, in the case of *The State* v. *Macbride*‡, it was held that where the law requires a certain majority to pass a law on any given subject, if the Court

* 1 Haw. and John., 236. † 1 Bay., 252.
‡ 4 Missouri Rep., 302.

finds that less than this majority did not assent, it shall declare the Act so passed void.

The State of New York till the year 1823 possessed a very important and salutary institution, one especially advantageous in a Federal Constitution. There was a Council of Revision to which all Acts of the State Legislature were submitted before they were finally passed into laws. The records of this useful body are said by Chancellor Kent to contain both eminent proofs of its ability, and "monuments of the wisdom, firmness, and integrity of the Council."*

Beside the Constitutional Act and subsequent Acts, the works to be consulted on the American Government are Chancellor Kent's *Commentaries* (4 vols., 1840); Mr. Justice Story's *Commentaries* (1833); and Dr. Duer's *Lectures* (1843). Valuable matter will be found also in Mr. Gore Ouseley's *Remarks on the American Institutions*, and in Professor Long's *American Geography*. The superficial work of Lacroix is even more meagre and imperfect than usual on this subject. It is inconceivable that any one, but more especially a professor of public law, writing in Paris at a time when all men's attention was directed to the American Constitution, and the attention of some men directed to it very profoundly, should (beside other great omissions) appear to be wholly ignorant of the most singular portion of the whole subject, the supreme power of the Courts of Justice in declaring Acts of legislation unconstitutional.

A very elaborate work was published in London by the elder President Adams, entitled *Defence of the American Constitutions*, in the year 1788. It is in three large octavo volumes; and abounds in references to the governments of other Commonwealths, ancient and modern. But its principal object is to defend, against the extreme democrats, the restrictions imposed on the powers of the Lower Chamber by the addition of another Legislative body.

* 1 Kent, 454.

TYRANNY OF THE IRRESPONSIBLE MULTITUDE.

The evils of the mob influence in the United States are such that the following observations may be deemed necessary. But they do not describe another great mischief of the same government in its functions—the perpetual canvass which exists during the whole interval between the President's election and that of his successor, in consequence of the holders of all places in the gift of government being removable. This is an enormous practical evil.

From all popular tyranny, whether spread over the people at large or concentrated, as it generally is, in the hands of certain powerful leaders, there is no escape, no redress against it, no solace under it. There is some help and relief to the sufferer who is oppressed by a tyrant or an oligarchy; he has the sympathy of the people. This is withheld from him who is the people's victim; his sufferings are exacerbated by the howl of popular execration or scorn. This has always been felt as a severe aggravation of the wrongs which popular iniquities or caprices inflict; and it is the harder to bear, that it falls heaviest upon the most delicate and sensitive natures. They whom a tyrant destroys at least know that they have earned his hatred; the people's victims may perish because of their services to the power which destroys them. The cruelty of the Parisian multitude, during the sad period of the reign of terror, was raised to a pitch altogether unendurable, by their savage exultation in the destruction of those patriots and sages who had devoted the best energies of their lives to the service of the people and the establishment of their liberties. It adds a bitter pang to those sufferings rankling in the hearts of high-spirited men, that their reputation, their fair fame with after ages, is exposed to be tarnished by the same tyrant of many heads, under whose displeasure they have unjustly fallen, possibly condemned for their virtues. The illustrious patriot whom a despot has doomed to die, may lay down his head on the scaffold in the confident hope that history will avenge his wrongs, and embalm his memory for the veneration of the good in all ages. But if Sidney and Russell had fallen by the voice of a misguided people, they never could have felt sure that

the dispensers of punishment might not also prove the dispensers of fame, and sully the reputation of those whom they had destroyed.

The same popular tyranny subjects men in a pure Democracy to constraint, and mutual suspicion, and terror, exactly like an absolute despotism, with this difference, that it is more easy to escape the agents of the royal tyrant, than those of the vulgar scourge the people, everywhere scattered abroad. When the predominance of one party in a Democracy has once been fully established, there is no safety for those who differ with it by ever so slight a shade. The majority is overwhelming, and all opposition is stifled. No man dares breathe a whisper against the prevailing sentiments; for the popular violence will bear no contradiction. Hence the suppression of wholesome advice, the concealment of useful truths. It becomes dangerous to declare any opinion, however sound, which is unpalatable to the multitude. Truth must no more be told to the tyrant of many heads than to him of one; nay, mere flattery becomes the food generally offered up, and he who goes before others in the extravagance of his doctrines, or the violence of his language, defeats by outbidding his competitors for popular favour. This vile traffic is alike hurtful to the people and to those who deal in it. The former are pampered and spoilt; the latter are degraded and debased.—For instances we need not go far back into history. The agitators in the French revolution were only safe if they adopted the most violent courses that were propounded. Robespierre succeeded by going beyond all others from the beginning of his public life. Marat went even beyond him; and, had not the revolting nature of his doctrine, recommending wholesale murder in plain terms, led men to pause on his honesty, perhaps on his sanity, he would only have been prevented by his death from outstripping Robespierre himself in the favour of the people. In this country we all can remember the time when it required extraordinary courage among popular chiefs to say a word against reforming, as it was termed, but destroying, as it meant, the House of Lords; and the most thoughtless or the most unprincipled of men actually pledged themselves, on a day fixed, to propose such a senseless measure, only because in so doing

they pandered more profusely to the supposed popular tastes. In the United States, as all travellers are agreed, the tyranny of the multitude exceeds the bounds of all moderate popular influence. No person dares say anything that thwarts the prevailing prejudices, or the general opinion of the day.

No. III.

GOVERNMENTS OF HOLLAND AND BELGIUM.

By the old Dutch Constitution the Stadtholder had both the whole military power in his hands and possessed an overwhelming influence over the deliberations of the States; but in outward appearance they and not he ruled. Though he had the right to propose anything to them, he had not even a chair allotted different from those on which the Deputies sate. As soon as he had stated his proposition he was obliged to retire while the States deliberated upon it. He presided over most of the civil as well as all the military departments, named many of the municipal officers in the towns, and derived great influence from being the Governor of both the East India and West India Companies.

The Deputies were chosen for life, except those for Zealand, who were appointed some for three, some for six years, and all were removable at any time when differing with their constituents. The whole assembly consisted of about fifty, of whom Holland sent six or seven, Guelderland nineteen, Zealand four, Friesland five, Oberyssel five, Groningen six. But whatever number of Deputies any province sent, it had only one vote: there were but seven votes in the whole body. Upon all ordinary questions a bare majority of the seven votes decided; but on all matters touching the "Essence of the Federacy," as it was termed, —war, alliances, taxation, the rights of each State,—the whole must concur. In short, the Union was a conference of independent States acting together under a Treaty; and any innovation upon the terms of that Treaty, or any important matter affecting their general

interests, must be assented to by each and by all. The Provinces presided week and week about, the first deputy of each taking the chair in his turn. The Council of State was composed of twelve Deputies; Holland sending three, the others, some one and some two each. Its office was to execute the orders of the States-General, and the Stadtholder presided over it. The Grand Pensionary was chosen by the States of Holland and Friesland for five years; but he was re-eligible, and he generally kept his office for life. He was the Counsellor of the States, in matters of law especially, and carried on the negociations with foreign powers. He also kept the records of the Confederacy. The different States contributed to the Federal charges in fixed proportions: Holland 58 per cent., Zealand 9, Utrecht 5, Friesland 11, Oberyssel 3, Groningen 5, and Guelderland 5. The population of Holland is about two-fifths of the whole, or one million in two and a-half millions.

There were material differences in the Provincial Constitutions, but a general resemblance pervaded them all in the more important points. As the States-General represented by deputation the different Provinces, so the Provincial States represented the towns of each Province. In all these there was a representative body; and in each the government of the towns whereof the State consisted belonged to the Nobles and the Magistrates of those towns. The inhabitants of each town were divided into guilds of arts and trades, with deacons (*Dekken*) at the head of each; in general each guild inhabited its own quarter of the town, with two *Wykins* to keep the arms in order; and over all the guilds of every town was a *Hoofdman*, or Captain of the Burgher guard. There were frequent musters and drills. The domain of each town extended some distance into the adjoining country, the rest of which was subject to the Nobles, who possessed the low jurisdiction, and sometimes the high also, and were exempt from paying direct taxes, but bound to serve in person, or by substitute. As originally the provinces were under the Counts, the chief Nobles formed a Council to assist the Count, and to examine judicial sentences, except in the towns where the Charter excluded this appeal. In Holland there were two bodies, the Nobles, or Equestrian order,

and the order of the Towns, or Burghers. Only the eighteen great towns sent deputies to this assembly, as Amsterdam, Dordrecht, Haarlem, Delft, Leyden, and Gouda; before 1545 the smaller towns were also summoned. Whatever number of Deputies any town sent, the whole had but one vote. The Chamber of Nobles formed one body; the number of Deputies chosen to it varied, but generally it was ten, and the whole order had but one vote. The States were always convened on a specific occasion for a specified purpose. If anything new was tabled there must be an adjournment, in order to obtain fresh instructions; so must there if any town was not represented, or if the Nobles did not appear by Deputy.

The principal officers of state were the Registers and the Pensionary, who prepared the measures to be discussed, and kept the records. The Pensioner was allowed to debate, and had great influence, but no vote. The nobles always chose the same Pensionary with the towns.

In some Provinces there were more bodies of States than one. Thus Friesland had three divisions, each having States. These divisions were distributed into Bailliages, twenty-eight in number, and each sent two deputies to the States, and each town two also. The Deputies of the Bailliages were chiefly Nobles.

The Count had a Council in each Province, called the *Broedschappe*, or council of wise men, which used in former times to deliberate on great affairs, but latterly only chose the inferior officers of the County. In some districts the choice of Councillors was vested in the inhabitants having a certain property, called the *Rykdom*, or wealth; thus in Hoorn, the most popularly constituted, every person having a fortune of 250 nobles voted. The election was in general of a complicated form, into which the Ballot entered. In some places the Council was a close body. Dordrecht was the most aristocratic, as Hoorn was the most popular government. There the Council was composed of forty persons, who held their places for life, and filled up the vacancies as they occurred in their own body. The Senate consisted of a Burgo-Master, nine *Echevins* (Sheriffs), and five *Rads* (Councillors).

The leading feature of the old Dutch Constitution was

Delegation. Each Deputy to the States-General, or rather, each Commission, each detachment of deputies from any of the seven Provinces, was not the representative sent to consult for the good of the whole Union, but the Delegate instructed to treat for the Province which sent the mission, the agent to give, according to the instructions of the principal, that principal's assent or dissent upon each question propounded in the assembly of the States. In the Provincial States it was exactly the same rule; each town was a commonwealth within itself, so far independent that it sent a person or persons to give its vote, not to confer with the Deputies of the other towns upon the general interests of the Province. Hence no councils upon any affair of general importance could be adopted in the States-General while one of the Provinces withheld its assent; and no measure affecting the Province could be adopted in the Provincial Estates if each town did not concur. The *liberum veto* prevailed in the United Provinces as much as in the Polish Diet; only that it was worse in the Diet, because those who exercised it were not deputies, but persons sitting in their own right, and each individual's assent became, therefore, necessary. But the principle was equally bad; it was mere delegation, not representation.

In 1795 the intrigues and the arms of France overthrew the Stadtholder, and established the Batavian Republic. Early in 1798, after many attempts to place the government upon the model of the French, the executive power was vested in a Directory of five, who, with a legislative body of two Chambers, governed the republic—all Federal Government being entirely destroyed. It was the obstinacy with which the people clung to the Federal scheme that rendered the establishment of this new constitution so difficult. That scheme is well adapted to gain the affections of the unreflecting multitude, and also of their selfish leaders; for it secures to each place a substantive weight and influence, and to each party chief a personal authority in the general administration of affairs. It may, however, safely be pronounced to be a system of policy eminently inconsistent with the best interests of the community, and indeed wholly repugnant to the very first principles of the social union.

It is not worth while to detail the arrangements of the Constitution of 1798, because it only lasted until Napoleon's power was sufficiently established by the victories at Marengo and Hohenlinden, and the peace with Germany that followed those marvellous events. In 1801 he succeeded in establishing a new form of Government, that is, a form new in its details, but founded on the same principles as that of 1798. It was not, however, easily or immediately that this new Constitution was imposed. The Legislative Body, by a narrow majority, rejected it when proposed by the Executive Directory; but an appeal to the people at large having been at the same time made, it was found that 416,419 votes were registered in favour of the proposition, and only 52,219 against it. Hereupon the Directory shut up the two Chambers and forthwith proclaimed the Constitution.

The executive power was vested in a Regency of twelve; the first choice of whom was made by the old Directory naming seven, and these seven naming five. Each year one of the twelve retired, and his place was supplied by the Departments or Provinces in rotation naming four persons, from whom the Regents chose two, and of these the Legislative Body chose one. The Regents had the disposal of the forces, naval and military, and the choice of their commanders, but none of themselves could be commander-in-chief. They had the conduct of all negociations, and the appointment of ambassadors; but war could only be declared with consent of the Legislative Body. They had the appointment of the Ministers, but the other functionaries were named by them from lists of candidates provided by the Departments, the Regents having, however, the power of requiring new lists if they rejected the whole names presented. The Departments of Administration appointed the subordinate officers. The Regents alone could propose laws to the Legislative Body. To be a Regent a person must be thirty-five years of age, and the salary of each was £1,000 a-year. They presided each three months in rotation.

The Legislative Body was composed of thirty-five members, the first thirty-five being named by the Government, and a third went out every year. The qualification was

being thirty years old, being a natural born subject, and having lived six years in Holland. The elections were made by Primary Assemblies, the active citizens having votes, that is, such as had attained the age of twenty-one, resided one year if a native, six if a foreigner, was able to read and write, and had a certain moderate amount of property. The Legislature met of itself thrice a-year, and had extraordinary meetings when convoked by the Regents. All taxes must have the direct sanction of the Legislature. But it was a singular regulation of this Constitution borrowed from that of France, that the discussion of all the legislative measures presented to it was carried on not by the Legislative Body at large, but by a Committee of twelve chosen by them each Session. The whole body then voted upon the Committee's Report without debate.

The administration was distributed among a number of Councils, under the Regents. Thus there was a Council of Commerce; one of nine members for the East Indian, and one of five for the West Indian possessions of the Republic; a Council of Marine, of seven members. These four Councils were appointed by the Regents. The Chamber of Accounts consisted of nine members, and these were appointed by the Legislative Body.

The Supreme Tribunal for the whole Republic was composed of nine members (the favourite Dutch number), chosen by five of the Legislative Body and five of the Regents. The members of this Higher Court held their places for life. The original jurisdiction of the Court was in all proceedings against members of the Legislature or the Government, and in all causes in which the State was a party. Its appellate jurisdiction extended over all the inferior Tribunals, whose decisions it could set aside for error in law, as a Court of Cassation; but it had also a general appellate jurisdiction over the Courts of Justice everywhere. It could order proceedings by the Public Prosecutor, whenever it deemed the State to have been injured. Though this Court was considered supreme, yet a kind of appeal, or something between an appeal and a re-hearing, could be had after any judgment pronounced by it. In this case Adjuncts were chosen from the Departmental Courts, and sat with it.

The General Public Prosecutor, and the Public Prosecutors before the Departmental Courts, were named by the Regents from triple lists sent by the Supreme Court and the Departmental Courts respectively. Beside these functionaries there were joined to the Supreme Court three Syndics, Doctors of Law named by the Legislative Body from a triple list presented by the Supreme Court itself. The office of the Syndicate was to watch over the Constitution established by law, to receive complaints concerning any breach of it, and to put the charge in a course of investigation.

In 1805 Napoleon caused a great modification to be made of this Constitution, though its fundamental provisions were retained. The Regency was abolished, and the executive power placed in the hands of a Grand Pensionary, elected for five years by the Legislative Body, and endowed with the power of naming the Council of State, and with the patronage of all the public functionaries, except those holding judicial offices, but having no legislative or judicial power whatever himself. The Legislature was reduced to nineteen members, chosen by the eight Provinces or Departments, Holland naming seven, Utrecht and Zealand one each, and the others two each; the Administration of each Province returned four names for each vacancy, which the Pensionary reduced to two, and of these the Administration chose one finally as the Deputy.

This Constitution was plainly intended only as a step towards creating Holland into a kingdom, which was accordingly done the following year; and the only change beside substituting an Hereditary King for an elective Great Pensionary, was the increasing the number of the Legislative Body to thirty-eight, of whom Holland chose seventeen, and the other provinces some two, some four, and some five. They were chosen for five years, and had a salary of £300 a-year each.

In 1810 Louis Napoleon abdicated the Crown, and the Batavian Kingdom was united with the French Empire. In 1814 it was again severed, and the Constitution now in force was established. The whole Low Countries, as well the Seven United Provinces as the Austrian Netherlands, were formed into one Monarchy, called the Kingdom of

the Netherlands; and at the head of this new State was placed the family of Orange. The Revolution of 1830 at Brussels, which apparently was caused by the contagion of the French Revolution in that year, separated the Dutch Provinces or Departments from the rest; and thus formed two Kingdoms, one of which remains in the Orange family, the other was conferred in 1831 upon Prince Leopold. The Constitution of each is the same separately as was that of the whole before this change, except that of course, the Legislative Body being divided into two, the numbers in each kingdom are diminished. We have only then to examine what was the Constitution established over the whole in 1815, and this task is easy; for it is substantially the same with our own. We shall, therefore, only have occasion to note those particulars in which it differs.

There is some difference in the course of the descent of the Crown and the provisions for the case of royal incapacity.

1. It is not, as in France, to the exclusion of females, nor, as in England, giving them the same succession after males as in real estate, only excluding coparcenary; but on failure of male issue of the person last seized, his brothers succeed to the exclusion of his issue female, and each brother becomes a stirps; but in case of the brothers leaving only issue female, it does not seem to be provided in what manner the succession shall go, whether to the daughter of the last seized or to the daughters passed over of the person whose male issue first failed.

2. The succession is limited to other families named in the event of total failure, families collaterally connected with the House of Orange. But on the failure of descendants in those families, the Legislature is to assemble as States-General, the two Chambers meeting and acting as one; and in this case the Lower House (or Second Chamber, as it is termed) must have double its usual number of members. The King is authorized to present a new law of succession to this assembly. If he dies without making such a proposition, the same body is to provide for the succession.

3. The Sovereign is prohibited from holding any foreign Crown whatever.

4. A Queen Regnant cannot marry without consent of the Legislature; she is held to abdicate the Crown by so doing; and if she has married before her accession without this consent, she loses her right of inheritance.

5. The income of the Royal Family is regulated by law; the King has £240,000; the Queen Dowager, £15,000; the Hereditary Prince, £10,000, and £20,000 if married.

6. The legal age is eighteen for the Sovereign, and the guardianship or regency is given previously to the emergency happening, by the King with consent of the States, meeting in one chamber, as provided in case of the succession failing; or if it has not so been settled, then by the States themselves. But, if the next heir to the Crown is eighteen years old, he alone has the right to the Regency. During the existence of the vacancy the Council of State possesses the executive power, and it assembles the States to provide for the emergency.

It must be admitted that this Constitution provides far more wisely and safely for the defects in the Royal authority than ours does. A general prospective law is always better than a measure adopted under the pressure of the emergency; and this is especially true of a measure such as that of naming a Regent. The Constitution of England, in fact, admits all the mischiefs of an elective Monarchy when there arises any incapacity in the Sovereign.

The prerogative is in some particulars more extensive than with us.

1. All colonies and foreign possessions are under the exclusive government of the Sovereign. There is no distinction made between those which are conquered and those already established under the national authority. The legislative power in all as well as the executive is in the Crown.

2. The King appoints the salary and emoluments of all public functionaries, even of the Judges; but he cannot alter the salary of the judges during their lives.

3. In the vacation of the Legislature the King can, on the advice of the Council and after consulting the Supreme Court, give such dispensations from the law to individuals as the emergency of the case may require; but he must

immediately on their meeting lay an account of such proceedings before the Chambers.

On the other hand, the prerogative has three limits unknown in our system.

1. Pardons can only be granted after consulting the Supreme Court of Justice.

2. All treaties for any cession or exchange of territory must be ratified by the Legislature before they can be valid. It may be observed, that such cession or exchange in England, if made of European territory, would probably not be held valid until confirmed by Parliament; but the case has never arisen in modern times, and since the constitution assumed a regular form.

3. The number of the Council of State is fixed; it cannot exceed twenty-four, exclusive of the Princes of the Blood; of whom the Hereditary Prince is the Counsellor by right whenever he comes of age. This restriction, however, of numbers applies to the paid Counsellors only. The King can name as many extraordinary Counsellors as he pleases; so that the difference between the two systems in this particular is rather nominal than real.

The Legislative Body consists of two Chambers, one of 110 deputies, the other of 40 at least, but which may be augmented by the Crown. The Deputies are elected by the States of the Provinces, which before the separation in 1830 were eighteen in number. Of these, Holland returned twenty-two, the two Brabants seven and eight respectively, and the two Flanders ten and eight, Hainault eight, and the other States some four, some five, except that Zealand returned three, and Dreuthe only one. This is called the Second Chamber, the other is called the first. The second is renewed by a third yearly going out; but they are eligible again. All military officers below the rank of major are ineligible absolutely. The President is named each session by the King from three presented by the Chamber itself. The members receive at the rate of £250 a-year, in monthly instalments, but only during the session; their travelling expenses are also paid. The age required is thirty years.

The members of the First Chamber are named by the King, and for life only; their age must be forty years at

least; they have a yearly salary of £300; and the King names their President every session.

In both Chambers the Ministers have seats, but no votes, unless they are otherwise members. The Chambers must both meet once a-year and sit thirty days before the King can prorogue or dissolve them. Extraordinary sessions may be called by him at his pleasure. The ordinary sessions before the separation were held alternately at the Hague and at Brussels. The vote is in both by ballot only when they have to make any election. The quorum of each is the majority of the members. Propositions of legislation come from the King to the Second Chamber; but that Chamber can address the King if the First concurs, requesting him to make any proposition, the First Chamber having no power of originating this proceeding. On any proposition coming from the King both Chambers must consent in order to make it a law; and the King's final consent is also required, although he should have originated the proposition.

The Provincial States are composed of three orders, Nobles, or Equestrian order, towns, and country districts. The number of the Members and of the Electors are fixed by the Crown on the report of a Commission. The Chamber of Nobles is composed of members named by the King. The right of voting in towns depends upon the Constitution of each. The States in each Province meet once a-year at least, and extraordinary meetings are called by the King. They choose the Members of the Second Chamber of the States-General. These Provincial States are elected by the municipal bodies which are established both in towns and country districts, and which are chosen by popular suffrage in assemblies that meet periodically. Also the local administration is under the Provincial States, but no local tax can be imposed without the Royal assent.

The Supreme or High Court of Justice is composed of members named by the King from a triple list presented for each vacancy by the Second Chamber; the King names a Member to be President; he also names the Public Prosecutor. All impeachments, all national causes, all causes in which the King or the Royal family are parties,

must come in the first instance before the Supreme Court. It has also an appellate jurisdiction over all the inferior tribunals. These are filled by the King's nomination on a triple list presented by the Provincial States. He likewise names the President and the Public Prosecutor in each. All places of Judges and Prosecutors are for life.

All changes in the Constitution are first propounded to the Provincial States, who add to the Second Chamber of the States-General a number equal to the ordinary number of Members. Two-thirds of the whole form a quorum, and three-fourths of those present must concur to adopt the proposed alteration. No alteration can be made, nor can the order of succession be changed, during a Regency.

The only material changes that have been made in this Constitution since the separation of 1830 have been the necessary one of the numbers which the two Chambers consist of, and which are in the Netherlands 51 for the First, all but 9 being nobles; 102 for the Second Chamber*; in Holland, from 40 to 60 for the First, and 58 for the Second; and the taking from the Crown all power of dispensing with or suspending the laws. The Crown has not the power of dissolving the Chambers, but can call an extraordinary Session. It can always adjourn or be prorogued at pleasure after the first twenty days. All peerages are for life. The Courts of Justice are bound to disregard any Royal Ordinance made for the execution of the law, and which is contrary to the general law. The responsibility of the Ministers has also been fully established in both countries; and every act of the King must be countersigned by some responsible person.

The particulars in which these Constitutions differ from our own are not many, and, except that of the Peerage being for life, they are not very material. Some of them, as those respecting the Regency, are undeniable and considerable improvements. The Constitution of the First or Upper Chamber is in every respect vicious; and in both countries, there being the materials of an Aristocracy more ample than in France, this is a serious defect needlessly introduced. But the form of Government is plainly mixed; it is strictly that of a limited Monarchy. Neither the

* The number is one for every 40,000 of the population.

Monarchical nor the Democratic principle predominates; and it is only less perfect than our own in consequence of less than its just share being allotted to the Aristocratic interest.

No. IV.

GOVERNMENT OF ATHENS.

THIS was the most purely democratic government ever established; and it could not have existed a month but for the checks provided upon the absolute power of the people.

The assembly (*Ecclesia*) of the people was composed of all males of free condition and twenty years of age, not convicted of any offence. The *Archons* or executive magistrates, of very limited power, were chosen annually by the wealthier classes; but in the assembly all powers were vested.

Peace and war, alliances, taxes, expenditure, legislation, were all entrusted to the same body, which likewise chose all the superior magistrates, the inferior ones being selected by lot. To the assembly, also, were all magistrates responsible for their official conduct; liable to be tried before it by impeachment, and to be punished by its sentence. This assembly met four times in every *prytaneia* of thirty-five days, or about once every nine days; but it was called together on any occasion that required its interposition, either by the senate or by the chief archon, or by the military commanders with the senate's permission. The checks upon its power were originally considerable; and some of them continued at all times, though some had ceased to operate. The president (the *Epistata* or chief of the *Proedri*) was always a member of the senate, and it was he who generally brought the business forward. No resolution could be taken by it unless the senate had previously sanctioned it by its vote. A measure adopted by the senate was valid and binding for one year, whether the assembly confirmed it or not; but no decree of the assembly could bind till the senate confirmed. But as

the power of the people increased, even though the senate, having so much to hope or fear at their hands in the amount and distribution of magistracies, became extremely subservient to the assembly, yet the latter, not content with their influence, by degrees assumed the direct power, not only of rejecting the senate's propositions, a power which they always possessed, but of making decrees and laws to which no previous sanction of the senate had been given. To sit and vote in the assembly required no qualification, except being twenty years of age and a native Athenian; but whoever was degraded by any infamous crime was incapacitated from attending, and it was a capital offence for a foreigner to be present. The ordinary meetings were thinly attended, and it was often necessary to send officers around for the purpose of compelling those in the street to come in under pain of being fined. The strict rule required six thousand to be present when personal laws, as decrees of banishment or naturalization, were made; but Thucydides tells us that, for many years of the war, so many citizens had been abroad on service or on business, that it had never been found possible to assemble five thousand. The expedient of giving pay to such as attended was latterly resorted to; and fourpence a day was found sufficient to attract the poorer classes. On great emergencies all the citizens, that is, all the people of Attica as well as the townsfolk, were summoned.* It was some check upon their proceedings that the old were allowed to speak first, and for some ages no one under fifty could begin a debate. It was a more effectual practical restraint that, though every one had a right to speak, hardly any one ever thought of doing so but the appointed orators of the State. But the proceedings were generally as tumultuous and as noisy as might be expected in these circumstances.†

The Senate was probably at first the council of the king, and then of the archon; but when that office became annual, the senate's authority must have greatly increased. Solon appears only to have increased its numbers, and made its power more solid. The chief prerogatives of the

* Thucyd., vii., 72.

† U. Emmius, *Vet. Græc.* (*Rep. Ath.*)—Car. Sigon., *De Rep. Ath.*, ii., 4.

government being afterwards transferred to the popular body, the senate had much less influence than before; but it always retained considerable weight in the administration. Solon had required that every resolution of the popular assembly should first be sanctioned by a decree of the senate; but this afterwards ceased to be the law. Yet the ordinary course of proceeding was that both should concur, and it was held to be a principle of the constitution that the senate's decrees had, without any confirmation by the popular assembly, the force of law for a year. Certain questions seem to have been reckoned its peculiar province, and those of great importance, as peace and war, the raising of money for the public service, the care of the navy, and of all matters concerning the religion of the State. But it entertained apparently all questions of a public nature. Its jurisdiction as a court was exceedingly confined. If any case of a pressing nature arose, not admitting delay, the senate considered it, and either sent it to be tried by the ordinary tribunals, or inflicted a fine, in imposing which it could not exceed five hundred drachmæ (about £15).* It had the power of expelling its own members, as well as of deciding upon their qualifications when returned.

The numbers of Solon's senate were four hundred; Clisthenes raised them to five hundred; and they were chosen by lot from all the tribes. Each tribe returned fifty,† and fifty more as substitutes,‡ to take the places of those who might die, or be found disqualified on the scrutiny. On being so returned each person underwent a scrutiny (δοκιμασία) as to his character and life; and he might afterwards be impeached before the senate itself for anything tending to disqualify him, as we see in some of the orations that still remain.§ The five hundred being chosen were divided into bodies or sections of fifty each, who presided in their turn, each of the first four sections for thirty days, each of the other six for thirty-five. The presiding section was termed the *Prytanes;* and there is some controversy as to the manner in which the presiding officers

* Demosthenes expresaly states this to be the limit of its judicial power.
† Λαχοντες. ‡ Επιλαχοντες. § Lysias, *In Philonem*—passim.

of the sections were chosen. One opinion seems to be, that each section divided itself into five bodies of ten each, and that each of the first seven of each ten was the chief, or *Epistata*, in his turn presiding one day in the senate, while the other three of each ten were left out altogether. —Another opinion is, that thirty-five or thirty-six of the prytanean section were, each in his turn, epistatæ of the prytanes, and consequently presided one day in the senate, while the epistata chose by lot one from each of the other nine sections, not being prytanes, and these nine were the proedvi, who presided at the general assemblies of the people.—All accounts agree in this, that no one presided above a day in his turn, and that all the selections were made by lot. The president of the senate, of whose authority the jealousy was thus great, generally opened the business for their consideration; and he kept the great seal of the State as well as the key of the citadel and treasury. The prytanes formed a kind of college during their month, and lived at the public expense in a place called the *tholus*, close to the senate-house, entertaining there the public guests and any citizens who received that high honour for their services. It was the duty of the prytanes to receive all proposals of a political nature from every quarter, to reduce them to writing if deserving attention, and to lay them before the senate. They prepared the business generally for that body, and their president (*epistata*) opened it to the meeting. Any proposition of a legislative kind, made in the senate, was referred to them. Some have supposed that the scrutiny into the conduct of magistrates was performed by them. This seems doubtful; but certainly they are represented as exercising great authority in the administration of public affairs from their weight in the senate. The daily pay of a senator was double that of a person attending the assembly, about eightpence sterling.

The voting was generally by the bean, or ballot in later times. Originally it was, as in the assembly, by holding up the hands.* The ancient authorities are full of allusions

* Car. Sigon., *De Rep. Ath.*, ii., 3—G. Postelli, *Rep. Ath.*, c. 7—U. Emmius, *Vet. Gr.* (*Rep. Ath.*)—Thuc., viii., c. 69. Plutarch (*Vit. Publicolæ*) says that the senate existed before Solon, but he doubled its numbers.

to the ballot, of which two are remarkable. Demosthenes says that the law required, when a foreigner was to have the rights of citizen conferred on him, that the voting should be not only by the bean, but so secretly, before strangers were admitted (that is, foreigners), that every one might be entirely master of himself, and examine in his own mind the merits of the party.* Æschines says that the senators had excluded Timarchus, voting by the leaf, that is with the names written down, but retained him afterwards voting by the bean; for which the people punished them by withholding the olive crown,† the reward given to senators on quitting their office.

It is here obvious to remark, that if the choice of the senate and of all those who presided in it, as well as in the assembly, were really made by lot, as was professed, there could have been no security whatever for the selection of fit persons. The scrutiny could not have been at all effectual for this purpose if it be true, as is represented, that only an equal number of supernumeraries (ἐπιλαχοντες) were returned. For how is it conceivable that out of twenty thousand individuals, the great majority of whom were of the lower description, the lot should fall upon only five hundred unfit persons in the one thousand returned? The probability certainly is, that seven hundred or eight hundred out of the one thousand should be unfit for the office. Possibly the inferior classes, though possessing the right, did not enroll themselves so as to be chosen to the senate, and were satisfied with being so enrolled as to have a right to attend the assembly. We can else with difficulty

* Κύριος ἂν αὐτὸς αὑτοῦ σκοπῆται πρὸς αὑτὸν ὁντινα μέλλει, &c. —*In Neær.* ap. Reiske, *Or. Gr.*, ii., 1375. He speaks of it as if the common voting by bean was not a complete ballot—ψηφιζόμενοι and κρύβδην ψηφιζόμενοι are here as elsewhere apparently distinguished. The main difficulty of the passage, however, is in the γυῤῥα ἀναιρεῖν, which some have read as if it were that screens were raised to protect the voters from observation, and others as if the only reference were to the booths being taken away before strangers were admitted; while Wolfius and others read it γεῤα (qu. γέρατα?), *i. e.*, taking up (ἀναιρεῖν) the freedom, or honour conferred. Yet it seems not very sensible to state that before the vote conferred the freedom, the freedom could not be taken up.

† Æsch., *In Tim.* The unpopular course was clearly the one they took when voting more or less secretly.—Reiske, *Or. Gr.*, iii., 129.

understand how any body could be thus formed resembling a senate in its character and functions.*

The Areopagus was a body of a very different construction, and it must have exercised a great influence over the proceedings of the assembly, if it had not a direct control. It is a remark of Plutarch that Solon, by these two councils, the Senate and Areopagus, made the commonwealth fast as by two anchors, in the popular tempests. He certainly did not for the first time erect the Areopagus, but he greatly extended its jurisdiction; and from other passages of the same writer it is clear enough that he only referred to the changes made by Solon in both these bodies.† Before his time the Areopagus had only a high criminal jurisdiction; he gave it a general censorial power, enabling it to punish by censures and exposure, and also by penalties, all transgressions against the rules of morality, and all infractions of the customs of the country. This important office it continued to discharge for about a century, when Pericles abolished it, and confined the jurisdiction to criminal matters and a general superintendence of the other tribunals, from all of which there lay an appeal to the Areopagus. It appears also, in sending causes to be tried by them, to have had a jurisdiction in the first instance. From its ancient respectability, from the high powers which it still possessed,

* Xenophon's opinion of the Athenians and their government was sufficiently low. "These folks," said he, "can easily distinguish good citizens from bad, and they like such as serve their purpose, how worthless soever they may be, hating public benefactors, as deeming that merit is rather hurtful than profitable with the multitude. Not that all this is to be blamed in the people themselves; every one has a right to pursue his own interest. But when you see any one not of the people prefer to live in a state subject to popular dominion rather than in one where an oligarchy is established, you may rely on it he does so from no good motive, but being determined to act amiss, he thinks he can better escape detection under a democracy than an oligarchy."—*De Rep. Ath.*, cap. ii.

† We may probably so understand also the passage in Cic. *De Off.*, lib. i., in which he compares Solon's institution of the Areopagus to Themistocles' victory at Salamis. Demosthenes treats the origin of the body as lost in fabulous antiquity, and describes it as having tried Mars for the murder of Halcrothus, on the complaint of Neptune. (*In Aristoc.*) J. Meursius clearly shows that the Areopagus existed before Solon. (*Areop.*, cap. iii.)

and from the higher which for many years it had exercised, with universal approbation for its rigid justice and its humane spirit, this body retained a great weight in the community; it occasionally interposed its authority on questions of a political nature, even after the time of Pericles. It was the highest and most venerable of all the tribunals. Even foreign States have been known to appeal to it, and refer their disputes to its arbitration. But what especially made its power and its proceedings of importance was the independence which alone, of all the constituted authorities, it appears to have enjoyed. It was the only body not immediately dependent upon the people; and this makes it the more to be lamented that several particulars in its structure and operations have been left unexplained by ancient writers.

The members were appointed for life, all the other magistrates being of annual nomination. They were chosen from those who had been archons, and who, on quitting office, could undergo a severe scrutiny, both as to their accounts, as to their whole conduct in the magistracy, and also as to their whole previous life. They were required to be well born, to have received a good education, and to have distinguished themselves by their public services. They must also have been of mature age: what that age was we are not told; nor is it anywhere asserted that there was any fixed period assigned by law; neither does it clearly appear before whom the scrutiny was made, in whom the decision was vested, or that there was an appeal from it if unfavourable. The *Logistæ* are represented as examining the ex-archon; but so they examined every one retiring from office. The logistæ were ten persons of great knowledge and respectability, chosen yearly, one from each tribe, before whom every magistrate was bound to appear, and render an account of his public conduct, within thirty days after the expiration of his office. In all probability the inquiry was originally confined to matters of account; but it seems clear that afterwards a more general investigation was entered into. Æschines distinctly shows that those who had no public money passing through their hands, nay, those who, so far from being public accountants, were, like the *Trierarchæ*, persons

chosen to undertake an expense for the public, were subject to this revision; and he asserts that the members of the Areopagus itself (who could have no* handling of money) were liable to be examined by these logistæ.† The logistæ had no power of passing a sentence; they could only acquit or send to trial those whom they examined; but their acquittal was not final; the party might afterwards be brought before the heliæa and condemned. The examination or scrutiny of the ex-archons, therefore, was a necessary proceeding, whether they were candidates for the Areopagus or not. The probability is that the Areopagus itself decided, taking into consideration, no doubt, the report of the logistæ; but it is generally agreed that the claim of the ex-archon to his place was irresistible if he possessed the qualifications required. As they had enjoyed the popular favour the year before when chosen archons, the Areopagus, was not likely to reject them if their merits were manifest.

The numbers of the Areopagus were necessarily uncertain; but it is singular that the ancient writers afford us no means of ascertaining how many they generally were. Sometimes they are said to have been thirty, at another time fifty-one; but if, as is generally supposed, Socrates was tried before them, the number who concurred in his sentence was above three hundred and sixty; and we are also told that before the eighty, who changed their opinion, went over between the trial and the sentence, the majority was only three. This would suppose a very numerous body, more numerous than the senate. Now nothing can be less likely than so numerous a body retaining at all times the extreme veneration in which they were held by a people as fickle as critical; not to mention the impossibility of so large a number resulting from the annual election of a very few persons, probably advanced in life. Either then there

* Æsch. *In Ctes.*—Dobson, viii., 173. When he adds that the Areopagus performs its high functions subject to the votes of the Heliastæ (*κυριαν αγει των μιγιστων ὑπο την ὑμετεραν ψηφον*), he means that the members might be impeached at the instance of the logistæ.

† There either were other magistrates of a similar kind called *Euthynæ*, or this is another name for the logistæ. The difference between the two is mentioned by some and denied by others. If they were different, probably the one class was confined to examining the accounts.

must be some error in the texts, or Socrates must have been condemned by another tribunal, probably, as we shall presently see, the Heliastæ.

The meetings of the Areopagus were held on the hill dedicated to Mars, from whence their name* was derived. One or more of the archons presided, and propounded the business at each sitting. The sittings were in the night; no advocate or party in addressing it was permitted to declaim or use any rhetorical artifice. The decisions were given by ballot. The person tried could not be sentenced the same day; and if he chose to fly, though on his trial for a capital offence, as murder or treason, neither the prosecutor, nor any magistrate, nor even the court itself, could prevent his escape. Sentence of outlawry and forfeiture was alone given against him.

Some have maintained, and J. Meursius among the number, that an appeal lay from the Areopagus to the assembly, as it certainly lay by Solon's laws from all other tribunals; and some passages have been adduced to prove this. But there seems little probability that it was so, and the passages are not unequivocal and decisive. Its high functions would seem to preclude this appeal: and learned men have held that the sentence being final, was one reason for St. Paul being dragged before it. But the true reason was, because at that period the Areopagus had the jurisdiction respecting the introduction of foreign gods. It is said that there are proofs of the decisions pronounced by it being reversed in the assembly, or rather by the Heliastæ. When these cases, however, are examined, it seems doubtful whether there had really been a judgment of the Areopagus, or only a report putting the party on his trial. This is at least certain, that in some cases it was armed with authority to pronounce a final sentence; that in others it appears only to have begun the prosecution; while in others it could review the decision of the Heliæa, and put a person on his trial a second time who had been acquitted. But even those who maintain that an appeal lay, admit that when the Areopagus did pronounce a sentence, there was hardly an instance of its giving dissatisfaction; and the passages are

* Αρειος παγος, Mars' hill, as it is sometimes translated, *e. g.*, in the New Testament relating to St. Paul's trial before this court, (Acts xvii.)

clear which represent that even the parties against whom the decision was given always acquiesced. Some say* that convicts always confessed they were rightly sentenced. Demosthenes himself, who did not go so far, yet says† that there never was an instance either of a prosecutor who had failed, or an accused person who had been condemned, being able to show that the Areopagus had decided erroneously. Practically speaking, then, their decisions may be considered as having been final. It appears that in some cases the Areopagus itself referred matters to the other tribunals, probably the Heliæa, notwithstanding that they had final jurisdiction respecting them.‡ How great was the influence of the Areopagus with the people appears from many instances. On one occasion, when a vote of the assembly had passed over Phocion, always unpopular with the multitude, and given the command of an expedition to their favourite Charidemus, the Areopagus went among them and by their authority obtained a reversal of the ill-considered decision, and the appointment of Phocion.§

Next to the Areopagus in importance was the court of the Heliæa, or the Heliastæ, which does not seem to have been a court of ordinary jurisdiction in criminal cases, but to have had special jurisdiction in these as it ordinarily had in civil cases, and to have had all important cases respecting the State and political offences brought before it, as part of its special and extraordinary jurisdiction. There seems good reason to think, notwithstanding the prevailing opinion of antiquaries in favour of the Areopagus, that the Heliæa sentenced Socrates; and the reference made to his trial by Æschines, when he says, "the people whom he is addressing put Socrates to death," may very reasonably be accounted for by the circumstance of the same people forming also the court of the Heliastæ. These were chosen by lot, and for the particular occasion, as it appears; the archon, to whom complaint had been preferred, and sometimes the Areopagus, directing a trial before them. The number varied according to the nature

* Lyc., *In Leoc.* † Dem., *In Aristoc.* ‡ Æschines, *In Tim*
§ J. Meurs., *Solon.*—Id., *Areopagus.*—Car. Sigon., *De Rep. Ath.*, ii., 5.—G. Postelli, c. iv.—U. Emmius, *Vet. Græc., De Rep. Ath.*

and importance of the cause; it seems never to have been less than 500; sometimes 1,000 or 1,001, and sometimes as many as 1,500. The charge against Demosthenes was tried before that number, as Dinarchus expressly states in his oration addressed to them, that they were so numerous;* and if there be no error in the text, Andocides, referring to his father's prosecution of Speusippus, says there were 6,000 present on that occasion.† It manifestly was only another, and a somewhat less promiscuous assembly of the people than the ecclesia. It was less promiscuous, because the age of thirty was required, and the numbers were taken apart from all the rest, though taken by lot. The number was fixed on each occasion by the archon. It was, on account of its great number, and the magnitude of the causes which came before it, reckoned the highest court; but as it only met rarely, and as the Areopagus was a permanent tribunal, beside its weight on political matters, its superior importance is manifest. A solemn oath was taken by all the judges, or rather jurors, of the Heliæa, binding them not only to judge according to the laws and the evidence, but also to maintain the established government, to resist all attempts at an extinction of debts, a division of real estates, the establishment of a tyranny or an oligarchy, or the undue election of magistrates; so that, though assembled for the trial of a cause, they appear to have interfered, at least as incidental to the subject-matter of their jurisdiction, with many of the most important branches, both legislative and executive, of the administration. Thus they were evidently called upon to repeal illegal decrees, and even to abrogate laws that had been made irregularly and unconstitutionally; because when any one was tried before them for having caused such a law to be passed, its repeal, as well as his punishment, was sought by the articles of the charge. In this respect they appear to have had a jurisdiction somewhat resembling that of the Federal constitutional court in the United States of America. There is every reason to suppose that most of the great political

* Reiske, *Or. Gr.*, iv.; Din., 72.

† Ib. iv., 9. He speaks of it as a court of 6,000. Καὶ ἠγωνίσατο ἐν ἑξακισχιλίοις Ἀθηναίων καὶ μιτίλαβι δικαστῶν τοσούτων 200.

causes of which we have any account were tried before this tribunal.

The *Ephetæ* were, next to the Areopagus, the most ancient of the judges, being, in the time of the kings, fifty Athenians and fifty Argives, who tried all crimes of homicide. In Draco's time they were reduced to fifty-one (to avoid the chance of equal division), and the Argives no longer formed part of the court. Afterwards each of the ten tribes chose five persons of the age of fifty at least, and of unblemished reputation; another was added by lot. These judges formed four courts, called the *Prytaneum*, *Phreatrium*, *Delphium*, and *Palladium*, which tried the different kinds of homicide; the *Prytanes*, for example, that which was occasioned by animals, or by inanimate objects. Solon is supposed to have given extended powers to the Areopagus as a counterbalance to the influence of the ephetæ. Some have confounded this tribunal with the senate, misled by the Prytaneum, which formed one of its divisions.* But the members, as well as its functions, were totally different. These prytanes however, that is, the tenth part of the senate in rotation, beside presiding by their epistatæ and proedri over the senate and the assembly, exercised, as we have seen, great powers, but not apparently any judicial functions.

Such were the constituted authorities of the Athenian system, resolving themselves all, more or less immediately, into the bulk of the people; and we are now to consider in what manner any control or check was provided, beside the Areopagus, to render the working of the machine regular, and keep it subject to any fixed law, or any influence other than popular caprice.

1. The appointment of public orators may be deemed some kind of check upon the popular proceedings, though it perhaps rather evinces the great sense which there was of some check being required, than the efficiency of the expedient resorted to. Ten orators were chosen (latterly at least

* J. Stephanus, *De Jurisd. Vet. Græc.*, cap. iv. In cap. iii. the learned author treats the court of the prytanes as the senate, and there is no inaccuracy in so doing, the senate having civil jurisdiction. But in cap. iv. he gives the same court jurisdiction as to homicide by animals and inanimate objects, which belonged to the branch of the fifty-one under the archon called king. He supposes Socrates to have been tried in the prytanes or senate.

by lot), who both in the senate and the assembly were to debate for the people, representing their interests, as it were; and they were paid a small sum each time they spoke.* They appear to have undergone a scrutiny before being allowed to act as orators, probably before they were drawn by lot; and any immoral conduct, or political or other offence, or any misbehaviour in war, precluded them from being chosen. They were also required to be natives, born of Athenian parents, to have one or more legitimate children, and to possess property in Attica. The same character and qualification, ascertained by the same scrutiny, was required of all others who would address the assembly, as well as of the Public Orators; and whoever succeeded in concealing any part of his former life from the court which examined him previous to his admission, was liable to be punished, as well as disqualified from acting in future, upon the imposition being discovered. In practice, hardly any one but the Ten Public Orators ever addressed either the senate or assembly; and this, as well as what has been stated respecting the choice of the senators, makes it very difficult to conceive that the lot really decided upon all these elections. Practically there may have been some arrangement or understanding by which the names of comparatively few of those eligible were placed in the urns.

2. The strict rules, however, respecting alterations of the law were a much more effectual check upon the wild democracy of the Athenian constitution. Fortunately a tolerably exact account of this is given in the orations which remain of Demosthenes and Andocides; an account which, if it is far from explaining every particular of the legislative process, yet shows clearly that there were delays interposed, and notices required to be given, which afforded an opportunity for reflection to the people themselves, for the exertion of such influence over them as the Areopagus possessed, and for the operation generally of the authority that always resides in the Natural Aristocracy of the

* It was one drachma, or eightpence. Nothing is more puzzling than the small sums which appear to have been received as adequate payment for public services, and to have been eagerly sought after. Three oboli (fourpence) a day for attending the assembly; for the senate, six oboli; nay, only the same for the Areopagus itself when sitting judicially.

community. The constancy with which the Athenians adhered to these rules rather than their original adoption, which was probably owing to oligarchical influence, is a proof how conscious they were of their own unfitness to be trusted with the supreme power, of the little reliance which they had upon themselves.

The three first assemblies each year were devoted to the consideration of new laws; but the two first of the three could only consider of such as were not repugnant to any law already existing. The proposal of a repeal or other law inconsistent with the old was then received, but it was rigorously exacted that no such law should be propounded without a previous repeal of the old. As soon as the proposition was made the senate appointed a number of persons called *Nomothetes*, or law-makers (some think fifty*), not by lot, but by selection, to digest and reduce it to writing. In that form it was laid before the prytanes, who were to make it public by immediately affixing it to a portico in a frequented part of the city, called the *Eponymi*, or Statues of the Ten Heroes. It was required to be thus placarded daily until the assembly again took it into consideration. Other nomothetes, said to have been five hundred, and chosen by the districts who returned the senate† (the *Demi*), then examined it, as did the senate itself. All the nomothetes must have served as Heliastæ, and taken the solemn oath of these judges. Then five persons were chosen, but not by lot, called *Syndics*, whose special duty it was to defend the old law, and of consequence to resist the introduction of the new. Finally, the assembly, on the full discussion of the question, determined upon adopting or rejecting the proposition.

* Reiske supposes the word δε to have been originally the cipher for fifty (*Or. Gr. And. de Myster.*, iv., 40), and he translates it so accordingly.

† There seems some reason for suspecting an error here, if not in the text, at least in the interpretation that has been given to it. Andocides says 500 nomothetes, ους οι δημοται ειλοντο (Reiske, *Or. Gr.*, iv., 40); and adds that they, meaning the nomothetes, were sworn before they proceeded. Demosthenes says they took the oath of the Heliastæ (*In Tim.*), but he says nothing of their appointment. If the demi, as Reiske supposes (viii., 336), actually elected the nomothetes, it is the only instance known of their making any choice; δημοται would describe the people, indeed, the assembly as well as the demi.

3. But another important restraint was imposed by positive law, and it operated at all times, and actively, though it was perverted, like everything else in that turbulent commonwealth, to the purposes of faction. It was criminal to bring forward any decree or any legislative measure which was contrary to the existing law: the first step to be taken was propounding a direct repeal. This of itself was a great security; inasmuch as men will often be averse openly and at once to abrogate an old law, or destroy an ancient institution, who would have little scruple about suffering it gradually to be undermined or indirectly assailed, and frittered away, as it were, by piecemeal. But suppose a person propounded a total repeal of the old law, he was compelled to substitute another in its place; and if this was not beneficial to the nation,* he was liable to be prosecuted at any time within a year, although the people and the senate should have sanctioned his proposition and passed the law—nay, although the same should have been acted upon. If his proposition, being adopted, had proved ever so beneficial, he was liable to prosecution unless he had brought it forward and carried it according to the strict forms of legislative procedure, having regard, among others, to the important rule which required direct repeal, and prohibited any indirect breaking in upon the existing law. Thus the responsibility under which the supreme power, the people, and the senate, could not be placed, was cast upon each member of the community who chose to put that irresponsible power in motion. Every person, be he ever so insignificant, was entitled, on this condition, to make what proposals he pleased; and no person, how powerful soever, was exempt from prosecution for his attempts to change the law, or to obtain decrees inconsistent with its principles. Nor was the concurrence of the state itself any guarantee of his safety. The same body which to-day joined in carrying his measure, might some months hence, nay some years hence (for it sufficed if the prosecution were commenced within the year, the trial might be at any time), join in working his ruin, and

* Ενιτηδειον τω δημω. (Dem. *In Timoc.*) The proper meaning is "fitted—well adapted." But in which way soever we translate the word, the argument must remain the same.

that without any original fault on his part or on theirs; because all might have been formally done, and the event might still prove the change to be hurtful. It is no wonder that the orators and party chiefs at Athens stood in great dread of such a proceeding, and regarded with the most serious apprehension the responsibility which they thus incurred in the discharge of their public duty, if you will, but certainly in the pursuit of their own ambitious objects.

This species of prosecution or impeachment was termed γραφὴ παρανομων—"charge or accusation of illegality;" and it was in constant use between the contending parties, or rival statesmen and commanders, down to the time of the Thirty Tyrants, who abolished it. The greatest orations of the two first orators of any age, Demosthenes and Æschines, were delivered upon trials of this description; and some others of Demosthenes hardly less noble, were prepared by him upon similar occasions to be delivered by different parties, it being the practice at Athens for private accusers to deliver speeches prepared by professional orators, as well as to defend themselves when charged, in those instances in which advocates were not allowed. Some doubt hangs over the question which of the tribunals had cognizance of this charge. There seems no doubt whatever that the great case of Timocrates was tried before the Heliastæ, and the probability is that the case of Aristocrates was also tried by them. There can be very little question that the case of Ctesiphon was disposed of by the same tribunal.

4. Some additional check was interposed by the rule which was laid down as to the numbers whose concurrence was required in the kind of proceeding most likely to be influenced by popular violence. It was a rule constantly in force that no law could be passed to affect any one person without affecting equally the whole people, unless 6,000 persons were present at the least. Beside the general law, many instances occur of this number being specially required by other laws, not indeed to join in the vote, but to vote in the question. Thus the admission of an alien to the rights of citizenship,*—the restoration of those citizens who had been disqualified by crimes or default—the remission of

* Dem. *In Neæeram.*

any debt * due to the public—are cases provided for by particular laws; although they all appear to come under the description of personal laws or decrees, and might therefore have been supposed provided for by the general law. It is to be observed that this rule only applied to the proceedings of the assembly; for the senate could act by the bare majority of its numbers; and the tribunals, such as the Areopagus and Heliæa, could proceed to sentence against individuals by the majority at meetings composed of comparatively few voters.

5. Beside these restraints there were others much more feeble, because they were attempts, as it were, of the people to put themselves under disabilities, and had little more effect than to show how much some control was desiderated. Upon a new law being made, it was not unusual to add a perpetual prohibition of any repeal or alteration. The funds for the army had been by Pericles diverted to give the people the power of attending theatrical exhibitions, in which they so much delighted. Eubulus, a demagogue, at the very time when the expenses of the war most required this supply to be restored, had a law passed making it a capital offence so much as to propose it.—The exemptions from serving certain expensive offices had been carried to excess; and Leptines proposed a law, not only recalling some of those already granted, but prohibiting, under pain of confiscation and infamy, any one to propose new exemptions in future; and it is to be remarked that, in the able and well-reasoned oration which Demosthenes wrote for one of the movers of the repeal (the time for prosecuting Leptines having elapsed), the absurdity of a law assuming to bind the legislature prospectively is not one of the grounds taken.† It is an observation of Mr. Hume, marked by his wonted sagacity, that such laws proved "the universal sense which the people had of their own levity and inconstancy."‡

6. There was a power vested in the presiding officer similar to that of such importance at Rome, of adjourning the meetings of the assembly upon any omen appearing to authorize it. The archons, too, appear to have possessed

* Id. *In Timoc.*

† Dem., 2*d Olynth.*, and *In Lept.* ‡ Essays, Part ii., 10.

this privilege; certainly the prytanes and proedri; though it seems to have been much more rarely resorted to than at Rome.

7. The referring so many important questions to bodies different from the assembly must be deemed a check upon its rashness and violence, even if those bodies were constituted in the same way with itself, which neither the Areopagus nor the Heliæa were. The Heliæa came nearest to it in composition, being taken by lot, and without any permanent functions. But even if out of six or seven thousand persons five hundred are chosen by lot, the merely setting them apart, especially if they are to act under the sanction of an oath, is likely to make their conduct more cautious and deliberative. We know how differently a very small number acts from the body out of which it is taken, in the instance of juries. To a certain degree the same kind of difference will be found to affect the proceedings of a much less select body like the Heliastæ. The same observation applies to the senate. There can be little doubt that the prytanes, though chosen like the other 450, and their president, though also selected by lot, felt an individual responsibility which did not influence the senators at large.

8. The uncertainty in which we are left regarding the right of appeal, and the course taken for obtaining the judgment of different bodies on the same matter, prevents us from being able to trace distinctly the operation of probably the most effectual of all these checks. One thing is however clear: there was a tendency to have the proceedings of each judicature reviewed by some one or more other bodies, and an option given of going before one or other of courts of concurrent jurisdictions. In some instances it is believed that two decisions of the same body were necessary to give any sentence effect. It should indeed seem from the oration of Demosthenes against Timocrates, that hardly any resolution or judgment was final until it was executed, and that two successive determinations of the Senate and of the Assembly did not prevent the whole ground from being again gone over before the Heliastæ. If there lay no direct appeal from the Areopagus, there were few instances in which that body did not, either

after or before pronouncing a final sentence, send the case to the Heliastæ. We have the remarkable instance of Demosthenes being either tried for bribery as to the whole matter, or at any rate as to the punishment to be inflicted, before the latter tribunal, after a unanimous sentence, or at least a resolution against him, of the Areopagus. The converse of this case was that of Antiphon, stated in the oration upon the Crown. He had been arrested for treason, and sent to take his trial in the Heliæa, where by the arts of a party he was acquitted, and he left the city. The Areopagus had him seized again, and again put on his trial before the same courts, though probably not composed of the same members, when he was put to the torture, convicted, and executed.* There can be no doubt that such a course of proceeding exposed parties to great hardships, an acquittal being no protection; but it is equally manifest that a security was derived from it against rash and inconsiderate determinations.

There was one kind of proceeding not peculiar to Athens, but more practised there than anywhere else, and which may be thought rather to operate in a contrary direction to those rules and principles now under consideration, giving a freer scope to the democratic power, rather than providing a restraint to it. It was an ancient custom, the origin of which is left in great uncertainty, that when any citizen had, either from his wealth or his renown, and it might even be from the reputation justly acquired by his eminent services or his singular virtues, attained an extraordinary degree of weight and influence, he was liable to be removed for a length of time by banishment, in order to prevent his acquiring a power dangerous to the liberties of the people, and inconsistent with the democratic form of the Government. This extraordinary proceeding was not of course regarded as a degradation; it was even affected to be treated not as a punishment; and it accordingly differed from ordinary or penal exile, because it was attended with no forfeiture, which always attended the other. In another respect it differed, that generally the place of banishment was assigned, although some have doubted this from the

* Dem., *De Cor.*

example of Themistocles, who, as a reward for such services as hardly any man had ever rendered to his country, was banished to Argos, and Thucydides nevertheless tells us that he went to all parts of the Peloponnesus.* It can hardly be supposed, however, that a person so unjustly treated as to be naturally bent on revenge should be suffered to go wherever he pleased; and we may therefore presume that the general rule was to assign the place of residence. The rules were very strict by which this proceeding was conducted. A day was appointed on which the people assembled in the public place or forum, where ten passages were prepared; by these all the tribes might go to the urns in which each person was to put his shell, or rather piece of earthenware in the shape of a shell, from whence the operation was termed *ostracism*. On this ware he was to write the name of the person whom he desired to banish. The nine archons attended, with the prytanes on the part of the senate, and they first of all counted the people present; if there were fewer than 6,000 there could be no sentence passed; and there are three wholly inconsistent accounts given of this quorum: one representing the presence only of the fixed number to be necessary; the second representing the number of 6,000 votes to be required, but a majority of these to be sufficient; the third representing 6,000 votes as necessary to sentence any person.† There is also an opinion adopted by men of great name, on the authority of an ancient writer, that no person under sixty years of age could vote, but that there must be 6,000 present of the legal age of twenty.‡ The

* Thuc., lib. i., c. 135.

† The account by Plutarch (*Vit. Arist.*) seems, in one respect, very unintelligible. He says that different persons were proposed for ostracism, and that he whose name appeared on the greatest number of shells was banished. It is easy to see that when one party proposed to banish an adversary his friends would retaliate. But if the vote was taken as Plutarch describes, it would follow that one or other must be banished, and only one; whereas the majority might be of opinion that both should be banished, or neither; and in the event of more than two being denounced, the consequence would be still more absurd.

‡ Car. Sigon., *De Repub. Ath.*, ii., 4; and he quotes Plutus's *Comment Græc.* U. Emmius (*Vet. Græc*) and A. Thysis (*Rep. Ath.*) adopt the same account. J. Meursius (*Att. Lect.*, v., 18) gives all the other learning on the subject.

time of banishment was ten years; but sometimes a decree of the assembly shortened this period. Some of the greatest and most virtuous men in Greece, Themistocles, Cimon, Aristides, suffered by ostracism for the influence which their merits had acquired; and it has been a general remark in all ages, that the excesses of popular violence never brought greater odium upon republican government than was cast upon it by this refinement of cruelty and injustice. The professed object was to give a security against the introduction of tyranny and the subversion of the popular constitution; but it would not be easy to imagine a worse result of any tyranny or of any change in the popular constitution than the enormity of ostracism itself. This detestable custom was in use both at Argos, Melitus, and Messina, and at Syracuse, where it was called *petalism*, from the names being written on leaves. In the three former places the Athenian term of ten years was adopted; in Syracuse it was only five; nor was it long tolerated there, even in this somewhat mitigated form.

It is manifest that all the circumstances which we have been considering depended for their influence, indeed for their existence, upon the strong disposition of the community, and especially of the numerous and inferior class, to abide by ancient customs, and to make the deviating from them an exception of rare occurrence. This principle was mixed up with religious feelings; and it was carefully inculcated by almost every one who pretended to acquire any sway over the people. All reflecting men must have early perceived that unless some rules were held sacred and immovable in the guidance of their proceedings, an entire destruction of the State must speedily ensue; the catastrophe which should involve the whole in anarchy, accompanied in all likelihood with subjugation to a foreign power, would almost certainly be attended with the rebellion of their numerous slaves; and the massacre of the free native inhabitants by these enraged inmates, the resident foreigners heading them, must have been a risk seldom out of the Athenian's view when political contention came to an extremity. The contemplation of a hazard never remote from the commonwealth was sufficient to prevent a people so singularly quick, acute, and intelligent, from lightly

neglecting established rules, on the enforcement of which their very existence seemed to depend. Nothing but such a phrenzy as seized the people of Paris once in two thousand years, and spread to infect the colonies, could have made the factious divisions that ruined St. Domingo possible in a settlement where, as in Attica, a few thousand free men were surrounded, and might at any instant be overwhelmed, by myriads of slaves. The modes of proceeding, then, to which we have been referring were generally speaking maintained by common consent and as a matter of course; and they must have had some tendency to moderate the power and regulate the caprice of the multitude. But after making all allowances, we must perceive that this power and caprice had quite scope enough to work the most extensive and the most remediless mischief.

The body of the people in whom so predominant a power was vested were for the most part in needy circumstances; they voted secretly; they were therefore exposed to corruption in all its forms, from the more refined influence of canvassing to the grosser substance of threats and bribes. Even supposing them to have acted without interested motives, their poverty, which was such that a large proportion received a small allowance daily from the public treasury or granary for their support, must have greatly jarred with any patriotic principles, if they had been sufficiently enlightened to feel their influence. But they were only half educated, and being wholly incapable of thinking for themselves, abandoned themselves to the guidance of demagogues, who drove the disreputable trade of gaining an influence over them by a life of artifice and intrigue. The statesmen of Athens were the most consummate artists in their calling of orators that the world ever saw, and they were among the most profligate and unprincipled men that ever obtained dominion over a nation.

The power possessed by the multitude to be exercised in crowded public assemblies, where nearly the whole business of the State, — executive, legislative, and judicial, — was carried on, made the profession of an orator the only important civil occupation, and they who pursued it united the calling of the hired advocate with that of the politician.

Now the necessity of advocates in every community governed by a system of laws is quite manifest; the service which they render is exactly this, that without their aid justice could not be administered, men's rights could not be secured, and the simple and the feeble could not be protected from the cunning and the powerful. But it is most essential to morals that the advocate should be only the representative of other men in that openly avowed capacity, and that all he says and does should be said and done by him as standing in the stead of the party. The politician, whether sitting in a senate by personal right, or delegated by others to consult for their good, acts in a judicial capacity, acts in his own proper person, and upon his own judgment; he delivers his opinion because such are his convictions, and there cannot be a more corrupt or a more debasing employment of his faculties, or a more pernicious use of his position, than being alike prepared to support any side of any question. If all the members of both houses of the English parliament, or both the French chambers, who ever bear a part in their debates, were also advocates practising at the bar, the constitution of those assemblies would suffer considerable damage from the unavoidable effect of the professional habit upon the political character. The large admixture of other leading men prevents this from happening to any great degree. If not only there were no such admixture, the advocate and the senator being completely identified, but if also the professional and the political functions were entirely blended and confused, by the judicial business being carried on in the same assemblies with the legislative, nay, in the greater number of cases the same question being both a cause and a law, or other State measure, it is easy to see how deep a wound must be inflicted upon public virtue—how wide a door opened to the contamination of statesmen's purity. The Athenian orator in some meetings of the Heliæa spoke as the hired advocate of a party who was on his trial, or was prosecuting an adversary; in others he wrote for lucre the party's speech which he was to deliver in his own person; and the greatest of all this celebrated body was known to have occasionally written the addresses of both sides. In other meetings of the same

tribunal he was to advise the State, but standing in the same place, addressing the same audience, employing the same resources, using the same artifices. No versatility of powers, no steadiness of principle, could in such circumstances enable any man to draw the line between the two capacities; and while he gave himself wholly up to his client in the one, reserve himself wholly for his conscience and his country in the other. It was of inevitable necessity that he came soon to regard the conflict of the senate and forum as the same, and to be ready for any side of any question in both. Bad enough is it for the State, degrading enough for the individuals, that there should occasionally be men, or bodies of men, actuated by party views to the excess of regarding principles as indifferent, supporting whatever measures may tend to further such paltry interests, and opposing, it may be, the self-same measures because their adversaries have adopted them. But what only happens on rare occasions in France or in England, and is the pity or the scorn of all good men, according as they happen to be of a more humane temper, or a more severe, was the constant state of things at Athens, marshalling men on whichever side they found it for their interest to take, and making all principles be treated in very deed as the counters wherewith the game of faction was to be played.

There can be no question that these men exercised the powers of government by leading the multitude; and as the military commands were bestowed by the assembly in the same way with the magistracies, the generals were drawn into the political contests, and became partizans of the orators, in some instances sharing in their corruption, though generally much freer from that taint than the gownsmen. These apparently were accessible to foreign influence, and even to corruption in its coarsest form. If all that is urged against Demosthenes respecting the embassy be put out of view, and his conduct before Philip be merely ascribed to embarrassment and timidity, there seems no ground for questioning the bribery that afterwards led to his conviction. That we have only the powerful speech of his accuser, and are without the reply which he may have made to it, and that a tradition re-

mains of Harpalus sending an account to Alexander of the manner in which he had squandered the treasure embezzled from him, without any mention of Demosthenes as receiving a part, is surely nothing like an argument to be set against the unanimous opinion of such a body as the Areopagus, by whose judgment, moreover, the great orator had professed his readiness to abide. Nor can the same excuse be urged for him that has been set up for the party in England which has been charged with receiving foreign pecuniary aid to further its attacks upon arbitrary power, and the establishment of its own principles.* The Athenian partizan had deemed it for the interest of his country to reject the proposals of the Macedonian, whose peculations made him the enemy of the prince he had robbed, until the fruits of those peculations were employed to silence the most eloquent of human tongues; and it never has been suggested that the money, if received at all, was employed for any public purpose.† The mercenary nature of Demades was never disputed—it was hardly disguised by himself; and Antipater's saying has been recorded, that he had two supporters at Athens, Phocion who would receive nothing, and Demades whom nothing would satisfy. Others made an open profession of such profligacy, and this

* There seems every reason to disbelieve the story, that the more distinguished leaders of the Whigs, especially Russell and Sidney, were parties to the assistance which some of them are believed to have had from Louis XIV. through his ambassador. Mr. Rose (*Observations on Fox's Historical Work*, sect. iv.) appears to acquit them of the charge, and he admits that the Tory leaders, with the King's connivance, received considerable sums, and even, like their master, pensions. Lord J. Russell, in his able and temperate Life of his illustrious ancestor (Chap x.), has convicted the principal author of the charge, Sir J. Dalrymple, of a misstatement so gross as well to deserve the epithet of "dishonest," which he gives it; and Barillon's predecessor, Colbert, it is curious enough to observe, describes the commissioners whom he was employed somewhat earlier to bribe, and among whom was the profligate and despicable Buckingham, almost as Antipater had described Demades—persons, he says, whom he plainly saw nothing would satisfy.

† Plutarch (*Vit. Dem.*) relates other instances of Demosthenes' corruption. If we may believe his account, Alexander found letters of the orator's in Persia, that proved his having received sums of money from that court. But no one can impeach his purity during the long struggle with Philip, his enmity to whom seems to have been the predominating passion of his mind.

became even the language of society among the political classes.—In fact, those politicians, looking to the support of the multitude, could always reckon upon a good chance of escape from prosecution; and if they were not actually condemned, they had always a sufficient number of partizans to cover them from the effects of public opinion. The operation of party in removing the chief incitements to good conduct, and the most powerful restraints upon bad, has been already explained.

The Athenian factions and democracy worked in this manner more effectually than faction in our times. It was often easy for an individual, without party connections, to obtain by rhetorical arts, especially when joined with corruption, indemnity for the worst conduct; and once secured by a vote, however narrowly carried in his favour, the clearest proof of infamy, in the eyes of all virtuous and reflecting persons, was of no avail in effecting his downfall. That the fickleness of the people afforded chances of escape we have numerous proofs. The instance of Antiphon's first acquittal has already been mentioned. The acquittal of Ctesiphon was perhaps justified in all the circumstances of the case, though it must be observed that the preponderance of the legal argument was against him, and that an award of the honour in question to Demosthenes, avowedly given as an irregularity, though to be excused by his services, was all that in strictness should have been decreed. But the numerous court suffered itself to be carried away by his eloquence, and, not content with honouring him, ruined his adversary, driving him into banishment by the failure of his prosecution. How little it was possible to reckon upon the course which the people would take in any given case appeared the more clearly from this, that they were then for the most part attached to the Macedonian party, and hostile to the great orator, whose own fate was not long afterwards sealed by the same fickleness of the same people, recalling him from a just banishment to serve their own purposes, and immediately afterwards abandoning him to the fury of his enemy and their own, at a moment when he was wholly occupied with providing for their defence.

The turbulence of the Assembly, and even of the less

numerous tribunal, the Heliæa, was as remarkable as the intrigues and profligacy of the leading men. On many occasions there was an uproar excited by the predominant party, for the purpose of preventing an adversary being heard; and this so successfully, that it is exceedingly uncertain whether some of the noblest remains of Attic eloquence were ever delivered.* Such scandalous scenes were not confined to meetings held upon political questions; those of a judicial kind were sometimes, though not so frequently, discussed under the same sinister influence; and instances were not wanting of the most eminent men, charged with the greatest offences, and desirous to defend themselves, yet prevented by clamour from obtaining a hearing. This happened to Demosthenes himself in one stage of the accusation brought against him for corruption; and it was therefore that he afterwards obtained a decree referring the case to the Areopagus. So sensible were the Athenians of this vice in their constitution, that an arrangement was made for the tribes taking upon themselves in rotation to guard the public meetings, and endeavour to maintain some order in their proceedings. The same causes, however, in which the evil originated affected also the remedy, and too often frustrated its operation—namely, the fickle, inconstant, volatile temper of the people, and the great number of persons appointed to keep down tumult. These preservers of order were themselves led away by the predominant feelings, yielded to the excitement, and joined in the violence which they were stationed to control.

That the Athenians had not formed those sober and calm habits of both thinking and acting upon State affairs, which alone can fit men for bearing a useful part in the government, and which may be wholly wanting even to a people of great acuteness, and very well acquainted with the particulars of each separate question brought before them, seems quite indisputable. It is also extremely probable that the same bad constitution might have worked far better with another nation, or with the same in a more advanced stage of improvement. But its vices were deeply rooted, and of a mischievous influence, which could in no circumstances have been fully counteracted. The want of the representative

* This controversy exists even as to the Orations upon the Embassy.

principle—the consequently too large numbers which attended the meetings of the most powerful body in the State —the exercise of administrative powers by such a number —the formation of the less numerous bodies by lot—and the confusion of judicial as well as legislative functions with executive—were defects of a nature so radical and pernicious as no improvement in the character and habits of the people could ever be expected to countervail. The entirely promiscuous nature of the Assembly, and the extension of the same vicious composition to the Senate and the Heliæa by the lot, exceedingly limited, though it did not wholly destroy, the influence of the Natural Aristocracy. This would of itself have been a fatal defect; but even had these assemblies been composed entirely of the classes most fit to govern, and had their numbers been in consequence greatly diminished, the confusion of functions, and the consequent imperfection of the judicial system, would have still made the constitution inadequate to provide for its own stability, and to perform the most important of the services for the purpose of securing which all governments are established.

It is, on the other hand, no less certain that the Athenian constitution was calculated to bestow those important benefits which flow from all popular systems, however ill contrived; and that at different periods it in fact did bestow those benefits. The universal competition of talents, the emulation in virtue, the personal interest in the public welfare, the zeal for promoting it, often at the expense of individual sacrifices, and very generally at the risk of individual suffering, not only led to the possession of extraordinary accomplishments, and the performance of brilliant exploits, but placed the whole powers of the community at the disposal of its government; and, when sound counsels were followed, produced results out of all proportion to the natural resources of the country. The very defects themselves of the system had this tendency. The part which each person was enabled, and even called upon to take in the administration, and the risk to which failure in any civil measure or any military enterprise exposed all statesmen and captains, must often have produced exertions little likely to be made under a more regular and a more just dispensation. These results were dearly purchased by

their concomitant mischiefs; and they were never to be relied upon in a scheme of polity such as we have been contemplating. The extraordinary efforts which were successfully made to resist foreign aggression, in circumstances which, after every allowance is made for the gross exaggerations of historians, recording, as usual, the traditions of national vanity, must be considered as all but desperate; and the great power which, after these exertions, Athens obtained for a considerable period of time, are probably without a parallel in the history of any other nation. No one, however, can examine the annals of those times without perceiving how precarious the advantages were that thus accrued from the system, and with how many serious mischiefs they were accompanied.

PREFATORY REMARKS TO CHRONOLOGICAL LIST OF WORKS.

THE following list has been compiled expressly for Messrs A. and C. Black's edition of Lord Brougham's works. Publications attributed to Lord Brougham, but about which there is any doubt, have not been included. Though he wrote a great deal, he yet had the credit of writing much that he never saw. Articles in the Penny Cyclopedia have been attributed to him: I am assured by the Editor, Mr George Long, that he never wrote a line for that work. Most of his publications, and especially his early pamphlets, produced numerous answers, replies, and rejoinders, frequently from men of high position, but more frequently from anonymous disputants. No information on this point is to be found in his "Life and Times."

For the sake of general readers, I may explain that every title is given in full, except where marks of abbreviation appear. Publishers' names and addresses have almost invariably been abbreviated, but sufficient is retained to show that all Lord Brougham's productions have emanated from publishing houses bearing the highest reputation. When a work has been published anonymously, I have indicated that fact by placing a small asterisk (*) at the beginning of the title; if under a pseudonym, a small line (⁻). The figures occurring immediately after the size of each book indicate the number of pages.

I have to make my usual acknowledgment, that without the Library of the British Museum, and its magnificent Catalogue, both so freely open to the use of readers, I could not have compiled this list. I have also had access to the admirably conducted Library of the Honourable Society of Lincoln's Inn, which, besides an extensive collection of legal and historical pamphlets well catalogued, contains several volumes of the original manuscript of Lord Brougham's judgments.

A

CHRONOLOGICAL LIST

OF

LORD BROUGHAM'S PUBLICATIONS.

Lord Brougham's first appearance in print appears to have been in the :—

1. Philosophical Transactions of the Royal Society of London, 1796, 1797, and 1798, 4to, in which was printed :—

Experiments and observations on the inflection, reflection, and colours of light, by Henry Brougham, jun., esq. Communicated by Sir Charles Blagden, Knt. Sec. R.S. Read Jan. 28, 1796, vol. 86, pp. 227 to 277, with a table. Also printed in Nicholson's Journal, 1797, vol. 1, p. 551.

This was written when Lord Brougham was only seventeen years of age.

Further experiments and observations on the affections and properties of light; by—read june 15, 1797, vol. 87, pp. 352 to 385, with a table. Also printed in Nicholson's Journal, 1799, vol. 2, p. 147.

General theorems chiefly porisms in the higher geometry; by —read may 24, 1798, vol. 88, pp. 378 to 396, with a table.

This paper begins:—"The following are a few propositions that have occurred to me in the course of a considerable degree of attention which I have happened to bestow upon that interesting, though difficult branch of mathematics; the greater part refer to hyperbola, as related to a variety of other curves. Almost the whole are of that kind called porisms."

2. The Edinburgh Review.

Lord Brougham was one of the founders of this world renowned quarterly, and a constant contributor on its commencement in 1802, and for many years after.

Some account of his connection with it will be found in his "Life and Times," and at page 258 of the first volume, he enumerates the articles contributed by him to the first four numbers; in the first twenty numbers he wrote eighty of the 369 articles. (See No. 109 in this list).

3. An enquiry into the colonial policy of the European powers; in two volumes, by Henry Brougham, jun. esq. F.R.S. Edinburgh,

printed by D. Willison, Craig's Close, for E. Balfour, Manners and Miller, and Archibald Constable, Edinburgh, and T. N. Longman and O. Rees, London, 1803, 8o, 4 + 588 pages, volume 2, 6 + 588, including the index.

In his "Life and Times" (vol. 1, 255) he says "hard-worked" as he then (1802) was with his "Colonial Policy." The following quotation from the same volume will perhaps account for no article having appeared in the Edinburgh Review on this treatise:—"The works published by its conductors were either not reviewed at all (as was the case with my own work on Colonial Policy)," p. 263. It is mentioned in the October number, p. 205, for 1804. The author advocates colonial establishments.

"Brougham's Colonial Policy, manifestly the *launcher*, and a capital one too, of a shrewd man of the world," Life of Wilberforce, vol. III. 194; see also the Gentleman's Magazine of Sept. 1840, p. 232.

4. Examination of the justice, legality, and policy of the new system of commercial regulations, second edition, with appendix, 1803.

I have never seen this, I find the title in Thorpe's catalogue for 1842, No 840, where it is under Lord Brougham's name.

5. *A concise statement of the question regarding the abolition of the slave trade. Lond. Hatchard, 1804, 8o, 108 *pages*.

Three editions of this anonymous pamphlet were issued the same year, and it was reviewed in the Edinburgh for July 1804.

6. *Thoughts suggested by lord Lauderdale's observations upon the Edinburgh Review. Lond. printed for Longman, 1805, 8o, 93.

This anonymous pamphlet was in reply to the observations by the Earl of Lauderdale, on the review [by Henry Brougham] of his Inquiry into the nature and origin of the public wealth, published in the 8th number of the Edinburgh Review, 1804. Referring to this review in the Edinburgh, for July 1804, p. 343, Lord Jeffrey says that he suppressed and altered a few sentences in the beginning, so that there might be no pretext for complaining of anything personal. Life and Times of Lord Brougham, I. 266.

7. *An enquiry into the state of the nation at the commencement of the present administration [motto], fourth edition, with additions. Lond., printed for Longman, Hurst, Rees, and Orme, Paternoster row, and J. Ridgway, Piccadilly, 1806, price 5s. 8o, 218, xviii.

Six editions appeared the same year, all anonymous. It was reviewed in the Edinburgh for April, and see Notes and Queries, fourth series, VIII. 523.

8. The speech of Henry Brougham, esq. before the house of Commons...april 1st 1808, in support of the petitions from London, Liverpool, and Manchester, against the orders in Council; taken in short-hand by Mr A. Fraser. Lond. Ridgway, 1808, 8o, ix. 84, 2s. 6d.

9. Speeches of Henry Brougham, esq. delivered before a committee of the honorable house of Commons, in opposition to a bill for incorporating certain persons by the name of the gas light and coke company (Strahan and Preston, Printers Street. London 1809), fol. pp. 31.

Printed by the opposers of the bill, because the friends of it had printed the speeches in support.

10. A letter on reform—only a limited number printed, 1811 ?

I have never seen a copy of this letter; it is no doubt the same piece as Lowndes (Bib. Man.) mentions as "a treatise on reform." Lord Brougham (Life and Times, II. 42) refers to it when writing to Dr Shepherd on the 25th August 1812; he says, "I send by this post a letter to Mr Roscoe to be published, if necessary or advisable, according to the news [of peace or war with America]...I sincerely hope it may be unnecessary." William Roscoe's letter in reply was reviewed by Lord Brougham in the Edinburgh, July 1812, and there were several other pamphlets on the subject, but the limited space at my disposal forbids enumeration here, as will frequently be the case in this list, but I may not again mention the omissions. "The history of these publications is, so far as we can recollect, shortly the following:—Mr Brougham having penned a treatise on reform, in the shape of a letter, of which he printed a limited number of copies for the use of his friends, some accident guided this production into the pages of a periodical work; but the farther circulation of it was, on the complaint of the writer, stayed by the authority of the court of Chancery. Mr Roscoe, however, formed one of the narrow circle originally favoured with a perusal of the letter; and Mr Roscoe thought proper to answer it in a tract...Mr Roscoe was publicly answered by Mr Merritt, whose answer forthwith occasioned a rejoinder...With the treatise of Mr Brougham we have no concern, for it is not regularly before the tribunal of the public. Of that of Mr Merritt we can say nothing, for it has not chanced to fall within our view." Quarterly Review, june 1812, p. 266.

11. Speech of Henry Brougham, esq. M.P., in the house of Commons, on tuesday the 16th of june 1812, upon the present state of commerce and manufacture, from a report taken in short hand. Lond. Longman and Ridgway, 1812, 8o, 2s. 6d.

I have not seen this, nor the following.

12. Speech to his friends assembled at Liverpool, oct. 16, 1812. 8vo.

I find this title in:—a Biographical Dictionary of the living authors of Great Britain, 1816.

I may here mention that I have been unable to find the "letter" and "evidence" referred to in the next paragraph, probably they were only printed in the newspapers.

It appears that on the occasion of his marriage, which had taken place quietly some months before, several of the papers commented on it. The Town and Country Magazine for Sept. 1838 further made it the occasion for republishing the facts as to the difference between Lord Brougham and Mr M'Kerrell in 1812, and printing Lord Brougham's letter to Mr M'Kerrell, who, it says, published the evidence, &c.

13. *An appeal to the Allies and the English nation in behalf of Poland. Lond. Harding, 1814, 8o, 66.

Published anonymously, but by Lord Brougham, Prince Czartoryski, and Count Sierakowski.

14. Speech of Henry Brougham, esq. M.P., on tuesday the 9th of april 1816, in the committee of the whole house upon the state

of the agricultural distresses. Lond. printed for Longman, 1816, 8o, 61, 2s. 6d.

15. The speech of Henry Brougham, esq. M.P., in the house of Commons, march 13th, 1817, on the state of the nation. Lond. printed for Ridgways, 1817, 8o, 82; another edition, Edin. 1817, 8o, 1s.

At the end is a list of the minority who voted for Mr Brougham's motion.

16. A letter to Sir Samuel Romilly, M.P., from Henry Brougham, esq. M.P., F.R.S., upon the abuse of charities. Lond. Longmans, 1818, 8o, about four sheets.

This went through eleven editions the same year. The ninth being in The Pamphleteer.

16-A. Appendix to Mr Brougham's letter, containing minutes of evidence taken before the education committee. Lond. Longman and Edin., 1818, 8o, 104.

This letter caused much controversy.

17. The speech of Henry Brougham, esq. M.P., in the house of Commons, may 8th, 1818, on the education of the poor, and charitable abuses. Lond. Ridgway, 1818, 8o, 49.

18. The speech of Henry Brougham, esq. on the education of the poor, spoken in the house of Commons, june 29th, 1820, vol. 16, No. 32 of the Pamphleteer. Lond. 1820, 8o, 29.

19. Mr Brougham's speech in the house of Lords, oct. 3d and 4th, 1820. Speeches of Mr Brougham, Mr Denman and Dr Lushington, containing the defence of...the Queen, each speech may be had separate. Lond. for T. Masters, 1820, 8o.

Each part has a separate title-page and pagination.

"It is well known that no man has gone beyond Lord Brougham in the patient finish of particular passages of his speeches; he has himself recorded that the ultimate peroration on Queen Caroline's case was written ten times over before he thought it worthy of the occasion; and we have heard from his lips within these last few years several outpourings on the Whigs, which no doubt had been concocted with equal and more delightful elaboration." [J. Wilson Crocker in] The Quarterly Review for June 1845, p. 62.

20. *Substance of the argument before the privy council, in support of the Queen consort's right to be crowned; published by her majesty's command. Lond. Longman, 1821, 8o, 42.

21. Trial of John Ambrose Williams for a libel on the clergy, contained in the Durham Chronicle of aug. 18, 1821, tried at...Durham...aug. 6, 1822, before Mr Baron Wood and a special jury, to which is prefixed a report of the preliminary proceedings in the Court of King's Bench, London. Durham, printed [and edited] by J. A. Williams; published by Ridgway, Lond., &c., 1822, 8o, 57. Third edition. Durham, printed at the Durham Chronicle office, 1831.

Mr Williams' preliminary address is left out of the third edition.

This speech is selected by the Law Magazine (1829, II. 102) as a specimen of forensic eloquence. "A meagre abstract is frequently all we are able to procure of the most admired pleadings. Luckily the case before us forms an exception. Not only was a reporter of high reputation employed, but Mr Brougham lent his aid in correcting; and so fastidiously did he polish his production for the press, that, in the judgment of many, it has been injured by an excess of care. Our main reason, however, for selecting it, is (what we hope it is no culpable breach of confidence to mention) Mr Brougham's having once said at Mr M. A. Taylor's table, that he never made a speech either in parliament or at the bar so completely to his own satisfaction as that in defence of Ambrose Williams. The speech, however, is little known, except in Durham and the immediate neighbourhood: the copies are scarce, and...we shall quote very largely."

"Were I asked to point out to you the finest specimen of Lord Brougham's mind as an orator, and which would at the same time display most vividly its originality and power, I should not hesitate to name his defence of Ambrose Williams for a libel on the clergy of Durham. Its perusal always touches me like martial music; and I know some of those who heard it delivered, and who describe the effect it produced upon the auditory as more resembling the shock attendant on a convulsion of the elements, than the work of a human being in a wig and gown." A Career in the Commons, by W. H. Harle, 1850, p. 44.

This speech brought forth:—*A letter to Henry Brougham...upon his Durham speech, and the three articles in the last Edin. Review upon the subject of the clergy. Lond. C. and J. Rivington, 1823, 8o, 104, two editions, dated from Lincoln's Inn, Feb. 10, 1823. "The Durham speech, and the three articles above alluded to, having excited much attention, we are desirous of calling the notice of the public "to the present able, manly, and judicious pamphlet." Gent. Mag., 1823, April, 341.

22. Inaugural discourse of:—on being installed Lord Rector of the University of Glasgow, april 6, 1825. Glasgow. University Press, 1825, 8o, 51.

Translated into German, and published at Jena, 1829.

23. Practical observations upon the education of the people, addressed to the working classes and their employers, by Henry Brougham, esq. M.P., F.R.S. Lond. Longmans, 1825, 8o, 2 + 33:—twenty editions the same year. It is dedicated to George Birkbeck, M.D., F.R.S., president of the London Mechanic's Institution.

Lord Brougham first mooted the subject in the Edinburgh Review, Oct. 1824. No. 81, art. v., afterwards noticed in No. 82, art. xii., in which notice the reviewer says, the most valuable part of the pamphlet appeared in their pages last October. The above work was translated into German by K. F. Klöden, and published at Berlin in 1827. Mr Baines says that the establishment of Mechanic's Institutes may be ascribed to this work. Life of E. Baines, 1851, p. 130.

24. Report of the speeches delivered in the Assembly Rooms, Edinburgh, at the dinner given in honour of Henry Brougham, esq., M.P., together with Mr Brougham's address to the students at his installation to the office of Lord Rector of the University of Glasgow. Edin. A. Stewart, 1825, 2s. 8o, 46.

A German translation by J. H. Rieken; published at Leipzig in 1833.

25.* Objects, advantages, and pleasures of science, extracted from the preliminary treatise of the Library of useful knowledge. No. liv. of vol. 27 of the Pamphleteer. Lond. 1826, 8o, 11.

26. Present state of the law: the speech of Henry Brougham, esq., M.P. in the house of Commons, on thursday, feby. 7th, 1828, on his motion that an humble address be presented to his Majesty, praying that he will graciously be pleased to issue a commission for inquiring into the defects occasioned by time and otherwise in the laws of this realm, and into the measures necessary for removing the same. Lond. H. Colburn, 1828, 8o, xii. 127. This edition has a contents and index. There were three editions the same year. The editors state that it was revised by lord Brougham. Dedicated to the Marquess of Cleveland. Also published in the Pamphleteer for 1828, vol. 29, p. 58.

A speech on, &c. verbatim from "The Times" newspaper. Knight and Lacey, 1828. The fourth edition the same year has a portrait. Reviewed in the Westminster Review, XI. 447, and the orator's opinions contrasted with Bentham's.

"I had the pleasure of performing an acceptable service for Mr Brougham. He had requested me to take notes of a speech he was about to make in the House of Commons on the subject of reforms in the Courts of Common Law. The object of this arrangement was to produce a volume, that should stand as a permanent record of the comprehensive views of the Law Reformer, upon those abuses which were felt by every man who was constrained to seek for justice in the courts of King's Bench, &c. The magnitude of the details was such as to deter any man from approaching them for legislative consideration, except the one man who could grasp them all, marshal them in due order, and bind the whole together by the power of philosophic generalization. My business would be to compare all the reports of the daily papers, to add my own notes, to introduce documents, and to carry the book through the press after the orator had examined this version of his great effort. On the afternoon of the 7th of February I am waiting the arrival of Mr Brougham in the lobby of the house of Commons. He soon arrives in company with Mr Serjeant Wilde. A little delay ensues before the Speaker sends the order for our admission under the gallery. Mr Serjeant Wilde and I sat together for six hours listening to this extraordinary display of mental and physical energy;—the orator never wearied, the listeners never wearying." C. Knight. Life ii. 69.

27. The speech of Henry Brougham, esq. as delivered in the house of Commons, on thursday, feb. 7, 1828, on his motion touching the state of the law in this country, and its administration in the courts of justice, with a view to such reforms in the same as time may have rendered necessary and experience may have shewn to be expedient. London. W. Benning, Fleet Street, 1828, 8o, 72.

Knight and Lacey also published editions of this speech.

For "A discourse of natural theology, 1828," see the 3rd edit. 1835, No. 35.

28. Corrected report of the speech of Mr Brougham in the house of Commons, may 18th, 1830, on Colonial Slavery. Lond. Ridgway, 1830, 8o, 34.

29. Reform : the speech delivered in the house of Peers on thursday, dec. 2, 1830, by Henry baron Brougham and Vaux, lord high Chancellor of Great Britain, upon the introduction of his Bill to reform the existing legal abuses of the Country. London, printed for F. G. Harding [1830]. 1s. 8o, 40.

Two editions the same year.

30. The speech of lord Brougham on reform in the court of Chancery, delivered in the house of Lords, on tuesday, feb. 22d, 1831, with a portrait and autograph. Lond. published by M. Stevens and Sons, 1831, 8o, 40.

Another edition :—

Lord Brougham's speech on reform in Chancery....Lond. John Knight, 1831, 8o, 24.

This is signed "Radical," and has a portrait of Lord Brougham.

31. The Lord Chancellor's speech on parliamentary reform in the house of Lords, oct. 7th, 1831. Lond. James Ridgway, 1831. 1s. 6d, 8o, 100.

Effingham Wilson also published this speech, and his print of it went through twelve editions the same year; other publishers also printed editions. The "Times" said, "The magnificent speech of Lord Brougham in support of the bill has eclipsed every effort of oratory made within the walls of Parliament in the memory of the living generation....It was a noble, a prodigious specimen of the power of human intellect."

The speech was translated into German.

32. Reports of cases argued and determined in the High Court of Chancery, by J. Russell and J. W. Mylne.

Lord Brougham's judgments, as reported in the above reports are reviewed in the Law Magazine for 1832, vol. VII. 348–378. See also No. 36.

33.* Selections from the speeches and writings of the rt. hon. Henry lord Brougham and Vaux...with a brief memoir of his lordship's life. Lond. J. Ridgway, 1832, 8o, vii. 259, 7s. 6d.

The advertisement is dated from Cambridge.

34. Corrected report of the speech of the Lord Chancellor in the house of Lords on july 21, 1834, on moving the second reading of the bill to amend the Poor laws. Lond. J. Ridgway and Sons, 1834, 8o, 65 ; two editions the same year.[1]

35. A discourse of natural theology, shewing the nature of the evidence and advantages of the study, by lord Brougham, F.R.S. and member of the National Institute of France, third edition. Lond. Charles Knight, 1835, 12o, vii. 296.

With a half title as follows:—"Paley's Natural Theology, illustrated. Preliminary discourse by Lord Brougham."

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[1] In this year was published a pamphlet under the pseudonym of Isaac Tomkins,, but attributed to Lord Brougham, entitled "Thoughts on the Aristocracy of England," &c. It caused much controversy; for more see the Handbook of Fictitious Names, p. 157.

There have been many editions of both these works, in different forms, see Lowndes Bib. Man., by Bohn, under Brougham and Paley. It has been translated into German, and published at Leipzig. Several pamphlets were published about the work, and there have been editions in America.

Paley's Natural Theology, with illustrative notes, &c., by Henry lord Brougham and Sir Charles Bell...with numerous woodcuts, to which are added preliminary observations and notes, by A. Potter, D.D., professor of moral philosophy in Union College; in 2 vols. New York. Harper Brothers, 1842, 12o.

There was another edition in 1845.

36. Select cases decided by lord Brougham in the court of Chancery, in 1833 and 1834, edited from his lordship's MSS, by Charles Purton Cooper...vol. 1. Lond. S. Sweet, 1835, 8o. xvi. 521.

The printer's proofs of this work are in the Charles Purton Cooper collection at Lincoln's Inn Library.

The whole of the second volume was in type, but never published. For a review of the editor's preface, and the object in publishing these reports, admitted to be better done in Mylne and Keen's reports. (See No. 32.) See an article in the Law Magazine for February 1836, p. 146, signed "H" (i.e. A. Hayward, now Q.C.?)

37. Speech of Henry lord Brougham on the stamp duties on newspapers in the house of Lords, on monday, the 23d of march 1835. Lond. Charles Knight, 22 Ludgate Hill, 1835, 8o, 16.

38. Speech of Henry lord Brougham in the house of Lords, on thursday, may 23d, 1835, on the education of the people, to which is added a summary of the last education returns to Parliament. London. James Ridgway and Sons, 1835, 8o, 67.

39. The speech of Henry lord Brougham in the house of Lords, on tuesday, may 21, 1835, on the education of the people. Lond., sold by R. Baynes, &c., 1835, price 2d., or 12s. per 100, 8o, 31.

40. Education: speeches and observations of lord Brougham, the marquess of Lansdowne, and lord Lyndhurst, in the house of Lords...june 29...printed by permission of the editors of the Mirror of Parliament. Lond. Darton and Harvey, 1837, 8o, 21.

The preface is signed by William Allen, the treasurer to the committee of the British and Foreign school society.

41. Lord Brougham's speech in the house of Lords, on monday, june 5, 1837, upon the business of Parliament, with the resolutions adopted by the house for altering the mode of conducting private bills (extracted from the Mirror of Parliament, by permission of the proprietors). Lond. J. Ridgway and Sons, 1837, 8o, iv. 28.

42. Lord Brougham's speech in the house of Lords, on thursday, june 29, 1837, on the education bill, with the remarks of lords Lansdowne and Lyndhurst, upon public education, to which is annexed a statement of the substance of the bill (from the Mirror of Parliament, by permission of the proprietors). Lond. Simpkin and Marshall, &c., 1837, price 2d., or 12s. per hundred, 8o. 15.

43. Lord Brougham's speech in the house of Lords on imprisonment for debt, tuesday, dec. 5, 1837 (by permission of the proprietors of the Mirror of Parliament). Lond. J. Ridgway and Sons, 1837, 8o, 25.

44. Opinions of lord Brougham on politics, theology, law, science, education, literature, &c., as exhibited in his parliamentary and legal speeches and miscellaneous writings [with a memoir]. Lond. Henry Colburn, 1837, 12o, 60 + 504. 12s.

This work has an index. It was reprinted at Paris in "Baudry's European Library," 1841.

45. Lord Brougham's speech in the house of Lords, wednesday, december 30, 1837, on the civil list, or the income and expences of the crown. Lond. J. Ridgway and Sons, 1838, 8o, 38.

46. Lord Brougham's speech in the house of Lords, thursday, january 18th, 1838, upon Canada. Lond. J. Ridgway and Sons, 1838, 8o, x. 61.

47. Lord Brougham's speech in the house of Lords, monday, jan. 29, 1838, upon the slave trade, with an abstract of the discussion which ensued, printed for the Abolition Committee. London James Ridgway and Sons, 1838, 8o, vi. 24.

Prefatory address to Richard marquess Wellesley, K.G., dated 30th janry. 1838, and signed Brougham. Lord Brougham sometimes corrected the newspaper reports of his speeches. In the "Life and Times," vol. 2. p. 270, he says he corrected the report of the case respecting legal privilege.

48. Lord Brougham's speech in the house of Lords, on tuesday, 2d february 1838, on the maltreatment of the North American colonies. Lond. J. Ridgway and Sons, 1838, 8o, preface xvi. speech pp. 37.

49. Lord Brougham's speech in the house of Lords, on tuesday, the 20th february 1838, for the immediate emancipation of the negro apprentices. Lond. J. Ridgway and Sons, 1838, 8o. v. 50.

Second edition same year. It is also reprinted in No. 111.

50. Lord Brougham's speech in the house of Lords, tuesday, march 6, 1838, upon the Eastern Slave trade. Lond. J. Ridgway and Sons, 1838, 8o, v. 65.

Preface addressed to Arthur, duke of Wellington, and signed Brougham.

51. The three speeches of lord Brougham upon Slavery, Negro apprenticeship, and the Slave trade, delivered in the house of Lords, jan. 29th, feb. 20th, and march 6th, 1838. Lond. 1838, 8o.

I have not seen this publication. There is a short notice in the Edin. Review, vol. xvii. 198.

52. Letter to the Queen on the state of the monarchy, by a friend of the people. Lond. Simpkin, Marshall, and Co., 1838, 8o. 46.

This immediately brought forth a shower of pamphlets, indignant, derisive, sympathetic, answers, replies, and rejoinders; and amongst them one entitled:—Lord Brougham not the writer of the "letter to the Queen on the state of the monarchy," proved by an examination both of the matter and style of the letter, by an enemy to such friends of the people.

"For just experience tells, in every soil,
That those who think, must govern those that toil."

Lond. Ridgway, 1839. (pseudonymous.)

53. *Speeches of Henry lord Brougham upon questions relating to public rights, duties, and interests, with historical introductions, and a critical dissertation upon the eloquence of the ancients, in four volumes, Edin. (printed) A. and C. Black, Edin. Longmans, Ridgway, and Knight. Lond. 1838, 8o.

Vol. 4 has an index: new edit., 1845.

54. Strictures on a life of W. Wilberforce, by the rev. W. Wilberforce and the rev. S. W. by Thomas Clarkson, M.A.; with a correspondence between lord Brougham and Mr Clarkson...Lond. Longman, 1838 (edited by H. Crabb Robinson). See his Diary, &c., 1869, p. 152, vol. 3.

55. Dissertations on subjects of science, connected with natural theology, being the concluding volumes of the new edition of Paley's work, by Henry lord Brougham, F.R.S., and member of the National Institute of France, in two volumes. Lond. C. Knight, 1839, 12o.

Inscribed to Thomas Lord Denman.

56. Analytical view of Sir Isaac Newton's Principia, by Henry lord Brougham...and E. J. Routh...Lond. Longmans; C. Knight. Edin. Black...1855, 8o, xxxi. 442.

This includes the second part of the third book, which was not in the edition of 1839. For criticisms, see "A Critical Dictionary of English Literature," &c., by S. Austin Allibone," p. 1418.

57. Historical account of the discovery of the composition of water. In the Edinburgh New Phil. Journal, xxvii., 1839, pp. 316–324.

Reprinted as appendix No. 1 of "Historical éloge of James Watt, by M. Arago, &c. Edin. 1839." See also the Edinburgh Review, lxx., 489.

58. Historical sketches of statesmen who flourished in the time of George III., to which is added remarks on party, and an appendix, first series, by Henry lord Brougham, F.R.S., member of the national institute of France. Lond. C. Knight and Co. 1839, r. 8o, ix. 404.

Inscribed to Mary Anne, baroness Brougham: on the last page is "end of vol. 1." Second series 1839, xiv. 334; on the last page is the word "Finis," so that probably the next series was not then intended to be published. Third series, with remarks on the French revolution, 1843, r.

8o, ix. 406 + 1, inscribed to M. Guizot. Each volume is embellished with numerous portraits by W. Holl, and other celebrated engravers.

At page 378 of the first series, Lord Brougham says that the Empress Catherine purchased D'Alembert's library. It was Diderot's (says J. R. in the Gent. Mag., July 1839, p. 37.), for which she paid him 100,000 livres, but left him the life-use of the books.

Paris. Baudry's European Library, &c., 1839, 8o, 2d edition.

A new edition, corrected by the author, in Knight's weekly volume, 1845, 12o, 6 vols., 9s.

A French translation was published at Lyons in 1847. See No. 61.

59. Inaugural addresses by Lords Rectors of the University of Glasgow...by John Barras Hay. Glasgow, 1839, r. 8o.

Inaugural address delivered by Henry Brougham, esq., on Wednesday, April 6, 1825, begins at p. 41, and ends p. 70.

60. A letter on national education to the duke of Bedford, K.G., from lord Brougham. Edin. (printed) A. and C. Black. Lond. Longman, Ridgway, and Knight, 1839, 8o, 48, 1s. 6d.

Edinburgh Review, LXX., 149.

61. Lord Brougham's answer to lord Londonderry's letter. Lond. Ridgway, 1839, 8o, 15.

This is in reply to:—A letter to Lord Brougham and Vaux, by the Marquis of Londonderry [C. W. Vane], Lond., R. Bentley, 1839, 8o, 58—relative to his character of Robert, 2d Marquess of Londonderry, brother of the above, in the Historical sketches of the statesmen of the time of George III.

62. Lord Brougham's speech in the house of Lords, on tuesday, feb. 19, 1839, on moving for a committee of the whole house on the corn laws. Lond. Ridgway, Piccadilly, 1839, 8o, 65.

Two editions same year.

63. Lord Brougham's speeches on the administration of justice in Ireland, with a preface. Lond. Ridgway, 1839, 8o, xix. 32.

The speech is printed in double columns.

64. Lord Brougham's reply to lord John Russell's letter to the electors of Stroud, on the principles of the reform act, third edition. Lond. Ridgway, 1839, 8o, 35.

Four editions the same year, dated from Grafton Street, May 4, 1839.

The Monthly Law Magazine and Political Review, which seldom lost an opportunity of saying the worst it could of Lord Brougham, as to this letter says, it "commences with the words 'Dear John Russell,'" and is subscribed *Henry* Brougham. This is as amusing (it says) as his describing himself in December 1834, in a tavern book at Calais, as "barrister *et homme de lettres*." (June 1839, p. 22).

65. A manual for Mechanics' Institutions, published under the superintendence of the Society for the Diffusion of Useful Knowledge (by B. F. Duppa; with outlines of lectures on politics and

political economy, by lord Brougham). Lond. Longman, 1839. 12o, x. 322.

The "notice" is signed, "Brougham, *chairman;*" the introductory chapter "B. F. Duppa."

65. The speech of lord Brougham at the Dover festival on proposing the health of the duke of Wellington. London. Simpkin, Marshall, and Co., 1839, 8o, 14.

66. An essay on female education...by the countess de Brunetiere Tallien, with a memoir [by and] of the authoress, [both] translated by lord Brougham; to be had at the authoress's residence, 6 James street, Westbourne terrace, Paddington [1840 ?]. 8o, 75; and a French version of the essay, pp. 9 to 56.

67. The oration of Demosthenes upon the Crown, translated into English, with notes, and the Greek text, with various readings selected from Wolff, Taylor, Reiske, and others, by Henry lord Brougham...Lond. Knight and Co., 1840, 12o, xxiii. 351, 10s. 6d.

The Times (March 21, 28 and April 3, 4), reviewed this work at great length, and the review was republished under the title of "A review of Lord Brougham's translation of the oration of Demosthenes on the Crown, reprinted from 'the Times' newspaper. Lond. Whittaker and Co., Ave Maria Lane, 1840, 12o, 167."

"In conclusion" (says a correspondent of the Gentlemen's Magazine for March 1841, p. 265), "I again express my regret that he" (the reviewer of the Times) "should have abused his talent...in availing himself of the publication to attack most violently the character of its author, who has done so much for literature, and who is universally admitted to be one of the greatest men of the age."

69. *Under the superintendence of the Society for the diffusion of Useful Knowledge: Political philosophy—principles of government—monarchical government—Eastern monarchies—European monarchies. Lond. published by the Society and Chapman and Hall, 1842.

The pagination of part 1, vols 1 and 2, is continuous, the title page of vol. 2 occurs between pages 364-5, and the volumes are anonymous—1843, part 2 (xiv. 393) of aristocracy and government has Lord Brougham's name on the title page, as also has part 3 (pp. xviii. 189), "of Democracy—mixed monarchy," this last part has no index.[1]

This work has been republished within the last year or two in three volumes, and so that each may be] sold separately under the title of:—Brougham's Political Philosophy. Lond. Bell and Dalby [18–], 8o.

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[1] "Lord Campbell, in his posthumous 'Memoir of Lord Brougham,' asserts that the Useful knowledge Society was ruined utterly by the publication of Lord Brougham's 'Political Philosophy.' There is not a word of truth in the assertion. Yet Lord Campbell was a member of the committee of that Society; he had constant means of access to me, from whom he knew that he could have learnt the facts; but he preferred a sneer at Lord Brougham to the truth. And the sneer will probably be accepted hereafter as truth." Thos. Coates in Notes and Queries, 4th S. ix. 489.

70. Speeches by the lord Chancellor [Lyndhurst] lord Brougham, lord Cottertham, and lord Campbell in the house of Lords, on tuesday the 9th august 1842, at giving judgment in the appeal, the rev. John Ferguson and others—appellants, against the earl of Kinnoull and the rev. R. Young—respondents; with the judgment appended, from Mr Gurney's short-hand notes. Edin. James Gall and Son [1842], 8o, 56, 1s.

Lord Brougham's speech begins at p. 9, and ends at p. 33.

71. Letters on law reform to the right honourable Sir J. R. Graham, bart. M.P., secretary of state for the Home Department, from lord Brougham. Lond. J. Ridgway, and Tait, Edin. 1843, 8o, 87, 2s.

Second edition the same year; there are two letters, one headed "Criminal Code," the other "Law Reforms of 1843—spirit of Party." Reviewed in Law Mag. xxx. 257.

"Although this pamphlet bears upon its title page the words Law Reform, it will be seen at a glance that the subject was adopted only as a peg upon which to hang a self-vindicatory, and it must be confessed, somewhat self-laudatory appeal from the verdict lately passed against him by the political press."

72. Lord Brougham's speech upon the Ashburton Treaty, delivered in the house of Lords on friday, 7th april 1843. Lond. Ridgway, Piccadilly, 1843, 8o, 70.

73. Dialogues on instinct, with analytical view of the researches on fossil osteology. Lond. C. Knight and Co. 1844, 12o.

Part of the series entitled, Knight's Weekly Volume. Originally published with and forming part of Lord Brougham's Dissertations...on Natural Theology. Lord Brougham translated the Latin quotations for this edition.

74. Speech of Lord Brougham upon the criminal code, in the house of Lords, on...13th may 1844. Lond. Ridgway, 1844, 8o 38.

75. Lord Brougham's speech in the house of Lords, on the law reform, may 19th, 1843. Lond. Ridgway, 1845, 8o, 4 + 34.

76. Lives of men of letters and science, who flourished in the time of George III. by Henry lord Brougham, F.R.S., member of the National Institute of France, and of the Academy of Naples, with portraits engraved on steel. Lond. Charles Knight and Co., 1845, royal octavo, xv. 516 and errata;—1846, vol. 2, xi. 516; with portraits, price two guineas; without portraits, one guinea.

The first volume contains Voltaire—Rousseau—Hume—Robertson—Black—Watt—Priestley—Cavendish—Davy—Simson. The second, Johnson—Adam Smith—Lavoisier—Gibbon—Sir Joseph Banks—D'Alembert. The portraits are engraved by Mollison, Hart, and others.

These volumes have no index. The first is inscribed "to Sir John Williams, one of the judges of the court of Queen's Bench, the second to Prince Albert.

This work was translated and published in French at Paris in 1847, and if I allowed myself to speculate in this list, I might say probably, it has been translated into other languages.

A review [by J. W. Croker] in the Quarterly Review, LXXVI. 62. For other reviews, not only of this, but of all Lord Brougham's best known publications, with critical quotations, see A Critical Dictionary of English Literature, by S. Austin Allibone. Lond, 1859–72.

"I have already referred to the admirable essay on Voltaire, which forms the first of the late Lord Brougham's 'Lives, &c.' No more liberal and discriminative appreciation of the literary labours of the great Frenchman exists; and the illustrious biographer records with equal fidelity the noble and generous deeds which the philosopher loved to perform." William Bates, in Notes and Queries, 4th S. II., 89.

77. Voltaire et Rousseau, par Henry lord Brougham....Ouvrage accompagné de lettres entièrement inédites de Voltaire, d'Helvetius, de Hume et orné de deux portraits gravés sur acier. Paris, librairie D'Amyot, éditeur. 6 Rue de la Paix, 1845, 8o, xi. 353.

The portraits of Voltaire and Rousseau are engraved by Mollison and Hart, with English inscriptions, and published by Charles Knight. This translation is inscribed to Lord Howden.

78. Two discourses on the objects, pleasures, and advantages, I. of science; II. of political science, by Henry lord Brougham. Lond. Charles Knight and Co., 1846, 12o, 197; has an index.

Originally published as the introductory treatise to the Library of Useful Knowledge. I believe this has been translated into Italian.

79. Letter to lord Lyndhurst, from lord Brougham, on criminal police and national education. Lond. Ridgway, 1847, 8o, 4 + 42.

The second edition, same year, has a postscript.

80. Lord Brougham's speech on the close of the session of Parliament, 1847. Lond. Ridgway, 1847, 8o, 24.

81. Speeches of...Erskine...with a prefatory memoir, by the right honourable lord Brougham, collected by the late James Ridgway, in four volumes. Lond. James Ridgway, 1847, royal 8o.

The memoir by Lord Brougham forms pp. ix. to xxii.

82. Inaugural addresses delivered by Lords Rectors of the University of Glasgow...Brougham...Edin. (printed by R Hardie & Co.) 1848, 8o.

83. Letter to the marquess of Lansdowne, K.G., lord president of the council, on the late revolution in France, by lord Brougham, F.R.S., member of the National Institute of France, fourth edition (with additions). Lond. J. Ridgway, 1848, 8o. xvi. 165.

Fifth edition, 1849. Reviewed in Law Review, IX. 208.

84. Speech...in the house of Lords on Italian and French affairs... april 11, 1848. Lond. 1848, 8o.

85. Speech of lord Brougham in the house of lords, on friday, may 12, 1848, on legislation and the law. Lond. Ridgway, 1848, 8o, viii. 80.

86. Speech of lord Brougham in the house of Lords, august 18th, 1848, on the affairs of Austria and Italy. (ibid.) 1848, 8o, 28.

87. Letter from lord Brougham to Sir James Graham, on the making and digesting of the law. Lond. Ridgway, 1849, 8o, 42, 1s.

Second edition the same year.

This pamphlet, says the Law Magazine, xlii. p. 288, is one of the very best things he ever wrote. It is at once just and bitter, sedate and caustic, vengeful and judicial, free from flights, and full of vigour, it has more than the characteristic acumen of Lord Brougham's restless and powerful mind. "One of the most important events of the quarter (Nov. 1849) is the celebrated and energetic letter...upon the absurd manner in which bills are passed in Parliament, and complaining in particular of the treatment which the Bankrupt Act received from the house of Commons last session." Ibid. 325.

88. Lord Brougham's speech on foreign affairs, in the house of Lords, on friday, 20th july 1849. Lond. Ridgway, 1849, 8vo, vii. 45.

89. Speech of the right honourable lord Brougham, in the house of Lords, on monday, may 7th, 1849, on the Navigation laws. Lond. J. Ridgway, 1849, 8o, 54.

The speech ends at p. 48. At p. 49 an appendix begins of quotations from Lord Brougham's "Colonial policy," the late Lord Durham's views, and Earl Grey's advocacy, &c., and the reader is informed that "these extracts are not added by Lord Brougham, who has only corrected his own speech at the request of the Ship Owners' Committee."

90. Recherches experimentales et analytiques sur la lumière [1853], Paris Comptes Rendus xxx. 1850, pp. 43–47, xxxvi. 1853, pp. 691–694. Paris, Acad. Sci. Mém., xxvii. (pte. 2), pp. 123–152.

91. Experiments and observations upon properties of light. Philosophical transactions, 1850, pp. 235–260. Sur divers phénomènes de diffraction ou d'inflexion. Paris, Comptes Rendus, xxxiv. 1852, pp. 127–129.

Further experiments on light. Royal Society's Proceedings, vi. 1852, pp. 172–174.

Further experiments and observations on the properties of light. Ibid. vi. 1853, pp. 312–415.

92. Inaugural address on the establishment of a law school, by lord Brougham, delivered as president of the Society for promoting the amendment of the law, at the rooms of the society, 21 Regent street, on july 3, 1850. Printed in the Law Review for august 1850, vol. 12, pp. 217–245.

Inaugural address on the establishment of a law school, by

lord Brougham, with a letter from lord chancellor Truro. [Lond.] Stevens and Norton, 26 Bell Yard, and Ridgway [1850], 8o, 32.

No title page. "Delivered as president of the Society for promoting the amendment of the law, at the rooms of the society, 21 Regent Street, on July 3, 1850."

93. A letter to lord Denman from lord Brougham, upon the legislation of 1850, as regards the amendment of the law. Lond. Ridgway, 1850, 8o, 70.

Reviewed in the Law Review, vol. xiii. pp. 143–163.

94. Recherches expérimentales et analytiques sur la lumière [1853]. Paris, Comptes Rendus, xxx. 1850, pp. 43–47; xxxvi. 1853, pp. 691–694. Paris, Acad. Sci. Mém. xxvii. (*pte.* 2), pp. 123–152.

95. Parties witnesses, speech of lord Brougham in the house of Lords, friday, 11th april 1851, on law of evidence bill. Lond. Ridgway, 1851, 8o, 24.

96. Law reforms of the next session; extract of a letter to lord Denman from lord Brougham, dated 16th august 1852.

Printed by permission in the Law Review, November 1852, 8o, vol. xvii. pages 138 to 150.

97. * History of England and France under the house of Lancaster, with an introductory view of the early reformation. Lond. John Murray, Albemarle Street, 1852, 8o, xiv. 473, 15s.

This history was published anonymously in the month of January. The preface says, "Nearly the whole of this work was written a considerable time ago. It is indeed above five years since the first portion of it was printed."

98. History of England and France under the house of Lancaster, with an introductory view of the early reformation, by Henry lord Brougham, D.C.L. OX., LL.D., F.R.S., member of the National Institute of France, and of the Royal Academy of Naples, chancellor of the University of Edinburgh, new edition. Lond. Griffin, Bohn, and Co., Stationer's Hall Court, 1861, 8o, xiv. 473.

This seems to be the first edition, with the addition of portraits, including one of Lord Brougham, a new preface, and a different title page.

Originally "published without any name, from the author's dislike of coming before the public when his duties did not require it." See p. viii. of the preface, which is dated from Château Eleanor-Louise, Feb. 1861.

The Law Magazine and Review (for 1861, xi. 203) says, the preface "mentions one curious fact, that the work was published anonymously many years ago. Its success, therefore, did not arise from the prestige which the name of the noble author would have attached to it, had he announced himself as the author."

99. * Life of the duke of Wellington, with lord Brougham's oration, delivered at Dover, oct. 1839. Lond. T. Nelson and Sons, and Edin. 1852, 16o, 196 + 7.

The seven pages of the oration at the end are separately paged, and appear to be from a different press.

100. Wellington orations—the speeches delivered on the 30th aug. 1839...at Dover, and on 13th nov. 1852, in the house of Lords; by—with a brief introduction by W. Hazlitt...Lond. Charles Westerton, 20 St George's place [1852], 8o, 12.

101. Law reform prospects; extract of a letter from lord Brougham to lord Denman.

Printed in the Law Review, Nov. 1853, 8o, vol. xix. pp. 144 to 159.

102. Lord Brougham's speeches in the house of Lords, 26th and 28th of july 1853, on County courts and law amendment. Lond. Ridgway, 1853, 8o, 47.

103. Copyright and patents; or, property in thought: being an investigation of the principles of legal science...with their bearing on the case of Jeffreys *v.* Boosey...in a letter to the right honourable lord Brougham and Vaux, to which is appended a correct report of the judgment delivered by the Lord Chancellor, lord Brougham, and lord St Leonards, by Montague R. Leverson, attorney and solicitor [with this motto] "The just is the expedient." Lond. Wildy and Sons, 1854, 12o, vii. 54, a table, lxii. 2s. 6d.

104. Extract of [a] letter from lord Brougham to lord Denman [on law reform], dated 10th sept. 1854, and printed by authority, though after lord Denman's death, in the Law Review, nov. 1854, 8o, vol. xxi. pp. 64–81.

105. Lord Brougham's speech on criminal law procedure—house of Lords, 23d march 1855. Lond. J. Ridgway, 1855, 8o, 38, 1s.

106. Lord Brougham's speech upon the slave trade, house of Lords, 26th June 1855. Lond. Ridgway, 1855, 8o, 10, 1s.

Upon his presenting the Barbadoes petition, a copy of which is given at p. 9

107. Religious liberty bill. Lord Brougham's speech in the house of Lords, july 27, 1855, with the bill, schedules, and notes. Lond. Ridgway, 1855, 8o, 46.

108. Works of Henry lord Brougham, in eleven volumes. Lond. and Glasgow. R. Griffin and Co., 1855–1861, 8o.

The above is the half title. The title of the first volume is "Lives of the philosophers of the time of George III." Vol. ii. Lives of men of letters of the time of Geo. III. Vols. iii., iv., and v., Historical sketches of statesmen who flourished in the time of Geo. III. Vol. vi. 1856, Natural theology. Vol vii. 1856, Rhetorical and literary dissertations and addresses. Vol. viii. 1857, Historical and political dissertations. Vols. ix. and x. Speeches on social and political subjects, with historical introductions: on military flogging, Queen Caroline, libel on the Durham clergy, &c., imprisonment for debt, bed-chamber question, Wellington speeches. Vol. xi. 1861, The British Constitution. Each volume or set of volumes has an index, and separate title page and pagination, and is complete in itself, but there is no general index, and no index at all to the last volume.

109. Contributions to the Edinburgh Review, by Henry lord Brougham, F.R.S., member of the National Institute of France,

and of the Royal Academy of Naples, in three volumes. Lond. and Glasgow. R. Griffin and Co., 1856, 8o.

This work does not comprise the whole of Lord Brougham's numerous articles, but only selections. As we have before mentioned (see No. 2), Lord Brougham has enumerated his contributions to the first few numbers of this renowned Review. It is doubtful whether a complete list will ever be made out, though it is said Lord Cockburn had a made-up copy (Notes and Queries, 4th S. viii. p. 111.)

For the last five years I have been collecting the materials for an essay, entitled "Lord Brougham and Literature, shewing all the publications written by, to, and about him," from which I have extracted this chronological list. During this time I have never allowed the mention of any article by Lord Brougham to pass me without taking a note of it, and I have already the nucleus for a list of his contributions, extending probably over a period of upwards of 30 years.[1] Many things which are still a matter of doubt and dispute, will most likely never be solved, as for instance the long vexed question whether he was the author of the article on Lord Byron's first poem, "Hours of Idleness," in the January number of the Edinburgh Review for 1808, and which brought forth Lord Byron's celebrated reply, the "English Bards and Scotch Reviewers."[2]

The question has been much discussed in Notes and Queries, to whose pages literary students must always be indebted for facts and information.

It is to be regretted that Lord Brougham does not throw the least light on these matters in his Life and Times; he neither acknowledges nor repudiates, he simply ignores nearly the whole of his literary life.

110. Lord Brougham's speech on life peerages, feb. 1856. Lond. Ridgway, 1856.

I cannot vouch for the existence of this speech as a separate publication, as I have never seen it. The title is taken from an advertisement.

111. Literary addresses...second series revised...by the authors. Lond. and Glasgow. Griffin, 1855, 12o. (Lord Brougham's address to the Manchester Mechanics' Institution, forms pp. 158 to 186.) Speeches of Eminent British statesmen, during the thirty-nine years' peace. Lond. 1857.

Lord Brougham's speech on the emancipation of the negro apprentices, 1838, forms pp. 83 to 129 of this volume. The above form two of a "Second series" of four volumes bearing the general title:—British Eloquence of the XIXth century.

112. Lord Brougham's Acts and Bills, from 1811 to the present time, now first collected and arranged, with an analytical review,

[1] An article [by W. Phillips] in the Edinburgh Review, Jan. 1837, p. 363, says of him, that he "is well known to have been one of the founders of this journal, and in early life a frequent contributor to its pages," and he was then and afterwards a contributor.

[2] Lord Cockburn says the "English Bards" wastes its fiercest and most contemptuous bitterness on Jeffrey, whom he (Lord Byron) believed to have been the author of the offensive article. But he was wrong in his opinion, for it was written by a different person (N. and Q. ibid.) In the "Recollections of Samuel Rogers" (1856, p. 236), we are told that Lord Byron "Being at last assured that the celebrated critique on his early poems in the Edinburgh Review was written by Lord Brougham, 'If ever I return to England, Brougham shall hear from me.' He added, 'That critique cost me three bottles of claret.'"

shewing their results upon the amendment of the law, by Sir John E. Eardley-Wilmot, bart....Lond. Longman, 1857, imperial 8o, 16 + lxxxvi. 879, including the index.

See "Lord Brougham's law reforms, &c., 1860," No. 126.

113. Lord Brougham's speech on the property of married women, in the house of Lords, feb. 13th, 1857. Lond. Ridgway, 1857, 8o, 23, 1s.

114. Lord Brougham's speech on parliamentary reform, in the house of Lords, august 3rd, 1857. Lond. Ridgway, 1857, 8o, 31.

115. The student's handbook of modern history...edited by Samuel Neil...with a sketch of the French revolution, by Henry lord Brougham, F.R.S. Lond. and Glasgow. R. Griffin and Co. 1857, 8o.

The "Sketch," precedes the "History," and occupies the first seventy-four pages. It was republished in Historical Essays and Dissertations, by Sir John Stoddart, Colonel Procter, Lord Brougham, Professor Creasy. Lond and Glasgow. R. Griffin and Co. [1859], 8o. Each essay is separately paged, and Lord Brougham's Remarks on the French Revolution forms seventy-four pages. I believe the "Remarks" were first printed in the Historical sketches (see No. 58), in this list.

116. Sur certains paradoxes réels ou supposés principalement dans le calcul intégral. Paris. Comptes Rendus, xliv. 1857, pp. 1134–1139, 1177–1184.

117. Recherches analytiques, et expérimentales sur les alvéoles des abeilles. Ibid. xlvi. 1858, pp. 1024–1029.[1]

Lord Brougham, in Paley's Natural Theology, had already written on this subject, which was somewhat a favourite one with him. "I also took much interest in the working of bees, more especially as regards the mathematical perfection of the structure of their cells, uniting strength with the greatest economy of materials, and satisfying every condition of a difficult geometrical problem. The speculations and investigations which this subject led me to pursue, did as much to cure me as the healthy air of Westmoreland." Life and Times, II. 291.

118. Addresses on popular literature, and on the monument to Sir Isaac Newton, delivered at Liverpool and Grantham, by Henry lord Brougham, corrected by his lordship. Lond. Edward Law, 1858, 8o, 63, 1s.

119. Deux discours, l'un sur la littérature populaire, l'autre sur le monument élevé à Sir Isaac Newton, par Henry lord Brougham, membre de l'Institut de France. Paris. Michael Levy, 1859, 12o, 55.

120. A biographical sketch of Sir Isaac Newton, by E. F. King...

[1] I have taken all these articles in the Comptes Rendus, without verification, from that noble monument to science, the:—Catalogue of Scientific papers (1800–1863). Compiled and published by the Royal Society of London, 1867,—in six volumes, quarto, each of nearly one thousand pages in double columns.

to which are added authorized reports of the oration of lord Brougham (with his lordship's notes) at the inauguration of the statue at Grantham...second edition. Grantham. S. Ridge and Son. Lond. Marshall, 1858, 12o, 2s.

121. Inaugural address to the National association for the promotion of Social Science, by the right honourable lord Brougham and Vaux, the president of the association. Forms pp. 10 to 28 of Transactions of the National Association for the promotion of social science, 1857. Inaugural addresses and select papers. Lond. J. W. Parker and Son, 1858, 8o.

122. M. [E. C.] Biot on the parochial schools of Scotland, translated by the right honourable lord Brougham, with notes and appendix, and a letter (of lord Brougham's) to the honourable lord Ardmillan, chairman of the banquet at the Burns Centenary Festival. Edinburgh and Lond. Ridgway, 1859, 8o, 52.

123. Address...in opening the congress of the National Association for promoting social science...1860, with notes. Lond. and Glasgow (printed) 1860, 8o.

124. Extract of letter from lord Brougham to the earl of Radnor.

Printed in the Law Magazine and Review, 1860, x. 176, to 181.

125. Installation address of the right honourable Henry lord Brougham, &c., Chancellor of the University of Edinburgh, delivered on the 18th May 1860, with notes. Edin. Adam and Charles Black, 1860, 12o, 71.

This was translated into French by Alexandre Peij, and published at Paris the same year. See Catalogue général de la librairie Française, par Otto Lorenz. Paris, 1867.

126. Lord Brougham's law reforms, comprising the Acts and Bills introduced or carried by him through the legislature since 1811, with an analytical review of them, by Sir John E. Eardley-Wilmot, bart. Lond. Longman, 1860, small 8o, xxiii. 251.

It will be found to contain a list of no less than forty statutes, which he has initiated and carried through parliament, besides upwards of fifty bills introduced by him at various periods. *Preface.* It is an abridgement of the Acts and Bills published in 1857. See number 112.

127. Tracts, mathematical and physical, by Henry lord Brougham, LL.D., F.R.S., Chancellor of the University of Edinburgh, member of the National Institute of France and Royal Academy of Naples. Lond. (printed) and Glasgow, R. Griffin and Co., 1860, 8o, xii. 304.

The preface says: These tracts were written at different times between 1796 and 1858. The first was inserted in the Philosophical Transactions, with two other papers on light omitted in this collection. These three belong to the years 1794, 5, 6, and 7, when the author was a student at the University, under Professors Playfair and Robinson.

128. Address at the opening of the National Association of Social Science at Dublin, on wednesday, aug. 14, 1861, with notes, by the right honourable lord Brougham: from the transactions of the Association. Lond. John Murray. 1861, 8o, 30.

129. Our exemplars, poor and rich; or, biographical sketches of men and women who have by an extraordinary use of their opportunities benefitted their fellow-creatures, edited by Matthew Davenport Hill, pastor of Birmingham; with a preface, by lord Brougham. Lond. Cassell, Petter, and Galpin, 1861 [1860], 8o.

Lord Brougham's preface occupies pp. vii. to xiii.

130. The circle of the sciences: a cyclopædia...with an introductory discourse of the objects, pleasures, and advantages of science, by Henry lord Brougham, edited by James Wild...The Lond. print. and pub. Coy., limited...London and New York [1862], 4o.

The introductory discourse forms pp. iii. to xxviii.

131. The life, letters, and speeches of lord Plunket, by his grandson the hon. David Plunket; with an introductory preface, by lord Brougham, in two volumes. Lond. Smith, Elder, and Co., 1867, 8o.

Lord Brougham's preface occupies pp. 1 to 24.

132. The life and times of Henry lord Brougham, written by himself, in three volumes. William Blackwood and Sons, Edinburgh and London, 1871, royal octavo, vol i. vii 552. A second edition of this volume was published the same year, vol ii. xii 516. Vol. iii. xii, 524.

The first volume has a portrait of the author from a painting by Sir Thomas Lawrence, and a lithograph letter at p. 536 of the Hon. Alex. Robertson. 1716.

Each volume has a table of contents, but there is no index, an omission which, for a big book, not expensive to get up, and commanding an enormous sale, is inexcusable. Lord Brougham left instructions to his brother to publish his life as he wrote it, which injunction has been scrupulously obeyed.

It is not surprising, considering the venerable age at which Lord Brougham commenced this autobiography, that a few errors and mistatements should occur. It has been pointed out that the tale entitled "Memnon," which Lord Brougham prints at p. 58 of the first volume as his own composition at the age of thirteen, is really a translation from Voltaire.

Lord Stanhope pointed out (in the Times of 12th June 1871) that the letter on p. 155 of the second volume, attributed to George III., was really written by his grandfather George II., and has often been published, and will be found in Coxe's Life of Sir Robert Walpole, i. 543.

The anecdote relative to driving a nail into the coffin of Lady Nightingale at Westminster Abbey, which Lord Brougham relates (at p. 205) as if his father was one of the actors, has been shewn (by Mr J. A. Picton, N. & Q. 4 S. vii. 277) not to have been possible, as his father was not born until several years after the death of that lady.

Mr Wyndham Smith, son of the Rev. Sydney Smith, points out in the Times of 3d July 1871, that Lord Brougham is mistaken when he states (ii. 488) that he gave the Rev. S. Smith a prebend in St Paul's—it was Lord Grey who gave it.

Lord Lyttleton has also in Notes and Queries, 4th S. viii. 311, 445, directed attention to a curious mistake. The sentence "from motives," &c. ii. 458, should be erased, as it belongs to *another* letter written to Earl Grey on Sept. 1, 1827, given in same vol. pp. 488–9.

133. Letters from lord Brougham to William Forsyth, esq., Q.C., LL.D., late fellow of Trinity College, Cambridge, not published. Lond. printed by Bradbury, Evans, & Co., 1872, 12o, 176.

"The letters are not remarkable in themselves, but are very characteristic of the diversity of attainments, untiring activity of mind, and kindliness of heart for which Lord Brougham was distinguished. Some fac-similies are given, and are not exaggerated specimens of the extraordinary hand which Lord Brougham ordinarily wrote." Notes and Queries (4th S. ix.)

The following is from the Eclectic Review for september 1868:—"Few will remember that multitudes in England in 1812 believed that to him the peace and commerce of England were indebted for their salvation in an hour of great peril, and that by efforts he put forth not in combination with any political party. Few will be at all aware of the floods of pamphlets poured from the press against him as question after question emerged, and especially in his intrepid endeavours to correct the enormous abuses of the charities of England; on the other hand, few will know that for these, and such like exertions, the...Review proved him to be at one time an Ahitophel, and at another and later period employed its pages for the purpose of running a parallel between his character and that of judge Jefferies in his judicial career."

MANUSCRIPTS

Forming part of the Cooper Collection now in possession of the Hon. Society of Lincoln's Inn.

1. Lord Brougham's original manuscripts:—Chancery and house of Lords, arranged alphabetically, in four bundles.

2. Judgments, &c., alphabetically arranged, 11 vols., 4o.

3. Proof sheets of his judgments, corrected by himself, 8o.

4. Three of lord chancellor Brougham's judgments, in his own handwriting:—Smith *v.* Nethersole, Knight *v.* Gould, Bennett *v.* Colley, 4o.

5. Proof sheets and manuscripts of his judgments, corrected by himself, fol.

6. Judgments in MS. corrected by himself: Bolton *v.* Corp. of Liverpool, Maule *v.* Maule, &c. fol.

7. Some original law papers and manuscript judgments, fol.

8. Proof sheets of vol. 2 of Cooper's reports temp. lord Brougham, put into type, but never worked off, fol. (see No. 36).

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OF

HENRY LORD BROUGHAM.

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